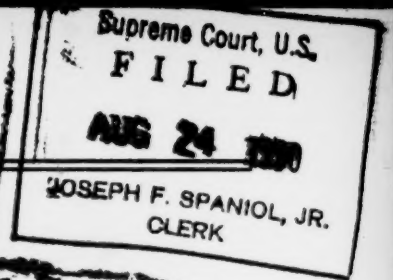


90-346⁽¹⁾
No. _____



IN THE
Supreme Court of the United States

October Term, 1990

TOLEDO POLICE PATROLMAN'S ASSOC., LOCAL 10, I.U.P.A.;
CHARLES R. NEARHOOD; DAVID M. O'BRIEN,

On Behalf of Themselves and all other
persons similarly situated,
Petitioners,

vs.

CITY OF TOLEDO; DONNA OWENS, MAYOR; GENE COOK,
VICE-MAYOR; CARTY FINKBEINER; LINDA FURNEY;
PETER UJVAGI; MARK PIETRYKOWSKI; STEVE
YARBROUGH; JUDY JONES; MAX REDDISH; C.E. RISER;
PHILIP HAWKEY, CITY MANAGER; JOHN MASON, CHIEF
OF POLICE; SGT. FRANK STILES; and SGT. RONALD
NAVARRO,

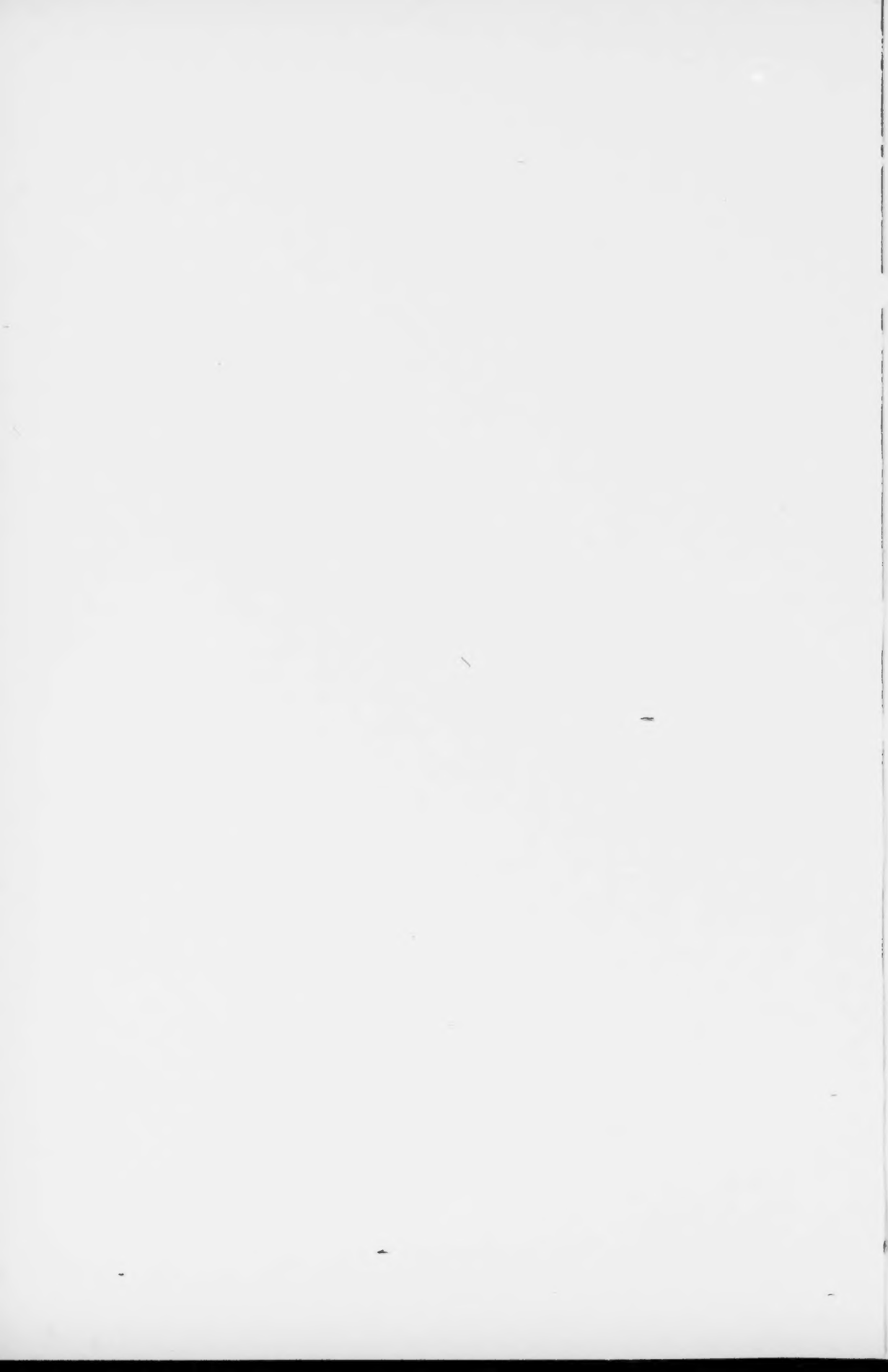
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Respondent City of Toledo, through its agents in Police Division Administration, acted under color of state law to deprive Petitioners Charles Nearhood and David O'Brien of rights, privileges and immunities secured by the United States Constitution and the laws of the state of Ohio.

2. Whether Respondents, Toledo Police Sergeants Ronald Navarro and Frank Stiles, unlawfully deprived Petitioners Charles Nearhood and David O'Brien of their liberty.



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SGT. RONALD NAVARRO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Now come the Petitioners, the Toledo Police
Patrolman's Association, Local 10, I.U.P.A., Charles
Nearhood, and David O'Brien, by and through their
attorneys, the law offices of Gallon, Kalniz and Iorio Co.,
L.P.A., and pray that this Honorable Court issue a writ
of certiorari to the United States Court of Appeals for
the Sixth Circuit to review the June 1, 1990 Opinion of
said Court.

OPINIONS OF THE COURTS BELOW

The June 1, 1990 opinion of the United States Court of Appeals (which has been designated as "not recommended for full text publication") is reproduced at pages A1 through A9 of the Appendix hereto. The United States District Court for the Northern District of Ohio, Western Division, issued several rulings and opinions, some of which appear only in the Trial transcript. The District Court's final order granting Defendants' Motion for Judgment Notwithstanding the Verdict, from which appeal was taken, is reproduced at pages A12 through A18 of the Appendix hereto. Other rulings and/or opinions entered in the District Court are as follows, listed in chronological order, with Appendix citations noted:

November 19, 1987 Memorandum and Order of the United States District Court granting Plaintiffs' Motion to Certify Class. *See App. pp. 19-22.*

November 19, 1987 Memorandum and Order of the United States District Court granting Plaintiffs' Motion to Compel Discovery. *See App. pp. A23-A27.*

March 18, 1988 Memorandum and Order of the United States District Court granting Defendants' Motion for Discovery Sanctions. *See App. pp. A37-A39.*

March 30, 1988 oral ruling of the United States District Court granting Defendants' Motion for Directed Verdict as to Defendants City of Toledo and John Mason, and denying Defendants Motion for Directed Verdict as to Defendants Ronald Navarro and Frank Stiles. *See App. p. A28.*

March 31, 1988 oral ruling of the United States District Court reinstating the City of Toledo as a Defendant with respect to the pendant state claim of false arrest, and oral ruling denying Defendants' renewed Motion for a Directed Verdict. *See App. pp. A29-A30.*

April 1, 1988 oral ruling dismissing the City of Toledo as a Defendant with respect to all claims, and denying Plaintiffs' Motion for Directed Verdict, and denying Defendants' renewed Motion for Directed Verdict. *See App. pp. A31-A34.*

April 19, 1988 Entry of Jury Verdict against Defendant in United States District Court, awarding monetary damages to Plaintiffs Charles Nearhood and David O'Brien. *See App. pp. A35-A36.*

August 22, 1988 Memorandum and Order of the United States District Court ordering Defendants to Supplement their Brief in Support of Motion for Judgment Notwithstanding Verdict with a discussion of the issue of qualified immunity. *See App. pp. A10-A11.*

Simply stated, the federal jury awarded damages to Petitioners Charles Nearhood and David O'Brien, and the District Court entered Judgment Notwithstanding the Verdict, citing the immunity from suit of the Respondents Ronald Navarro and Frank Stiles.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The Federal jurisdiction of the District Court below was invoked pursuant to 42 U.S.C. Section 1983, 28 U.S.C. Section 1343, 28 U.S.C. Section 2201, Rules 23, 23.2, 57 and 65 of the Federal Rules of Civil Procedure, and the District Court's power to assert jurisdiction over pendant claims based on state law. The case at bar is an action for declaratory, injunctive and monetary relief, to remedy the Respondents' violation of the Petitioners' civil rights, as set forth in the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. *See* Appendix pp. A44 to A45.

The United States Court of Appeals for the Sixth Circuit entered judgment in the case below on June 1, 1990. This Petition is filed within ninety (90) days after the entry of the decision of the Court of Appeals, pursuant to 28 U.S.C. Section 2101(c) and Rule 13.1 of the Rules of the United States Supreme Court. Further, upon Petitioners' Motion, issuance of the mandate in the case below has been stayed through August 24, 1990, and this Petition is filed within said time frame.

STATUTORY PROVISIONS INVOLVED

The instant Petition raises questions of law involving 42 U.S.C. Section 1983 (civil action for deprivation of rights), 48 U.S.C. Section 1343 (civil rights and elective franchise) and 28 U.S.C. Section 2201 (creation of remedy)—all pertaining to Petitioners' claim that the Respondents acted under color of law to deprive Petitioners of rights, privileges and immunities secured by the Constitution and laws of the United States. Petitioners' pendant claim arising under Ohio law involves application of Ohio Revised Code Section 2905.03. *See* Appendix pp. A46 to A48.

STATEMENT OF THE CASE

In the early morning hours of September 3, 1986, a male pedestrian was brutally attacked and sexually assaulted in the vicinity of City Park in Toledo, Ohio. *See App. pp. A69-A70, A93.* On that morning, Petitioners, Toledo Police Officers Charles Nearhood and David O'Brien, were assigned as partners on a "wagon crew" (i.e., a two man patrol in a marked white Police Division van). *See App. p. A57.* During their eight o'clock p.m. to four o'clock a.m. shift, Officers Nearhood and O'Brien patrolled "Sector 7," the Police designation for the general area in which City Park is located. *See App. p. A57.*

The City Park assault was initially assigned to the Toledo Police Division Personal Assault Unit. *See App. p. A69.* However, as the victim hovered near death, on or about September 15, 1986, the Police Division reassigned the case to the Homicide Unit. *See App. p. A69.* Sergeant Ronald Navarro, of the Homicide Unit, was assigned to head the investigation. *See App. pp. A69-A86.*

The allegation of police involvement in the City Park assault came to light early in the investigation. *See App. pp. A80-A81.* A witness named Ed White was interviewed on two occasions by Police Division investigators. *See App. pp. A71-A74.* Ed White claimed that he was in City Park on September 3, 1986 and had witnessed two police officers using their night sticks to hit a black male. *See App. p. A71.* Ed White alternately alleged that he had happened upon the officers on his way home as they were beating the man in City Park and/or that he went to City Park to view the incident after another witness (one "Johnny Ringo") had reported observing the beating in City Park. *See App. pp. A71, A73-A74, A82-A83.*

Sergeant Navarro interviewed "Johnny Ringo" (aka Johnny Johnson) regarding his observations at City Park on the night in question. *See App. pp. A76, A78.* Johnny Ringo said that he observed a white van in a parking lot along the side of City Park, and stated that he presumed that the vehicle was a Toledo Police Division van, although he could not specifically recall any identifying markings on the van. *See App. pp. A78.* Sergeant Navarro reviewed the initial reports and the police dispatch cards from the night of the assault. *See App. pp. A77-A78.* The cards and reports reflected that Officers Nearhood and O'Brien, and two other officers assigned to a wagon crew, were in the area of City Park at the approximate time of the assault, as evidenced by their either having made an arrest or reported encountering a citizen in the vicinity of the park. *See App. pp. A76-A77.* On or about September 20, 1986, Sergeant Navarro interviewed Officers Nearhood and O'Brien and the officers on the other wagon crew. *See App. pp. A76-A77, A86.* In the course of the September 20 interview, Sergeant Navarro reviewed the dispatch cards and verified the officers' activities for the night of September 2-3, 1986. *See App. pp. A57, A63, A76-A77.* On or about September 22, 1986, the Police Division Internal Affairs Unit also obtained statements from Officers Nearhood and O'Brien. *See App. p. A63.*

On or about September 23, 1986, Ed White was asked to view an array of photographs to identify the officers he claimed to have seen in City Park. *See App. pp. A74-A75.* Ed White identified two officers (not the officers assigned to wagon crews in the City Park area) and reiterated his allegation that he saw a Toledo Police Division van in the area. *See App. p. A75.*

The incident giving rise to the case at bar occurred on September 24, 1986. Sergeant Navarro testified that, on September 24, 1986, he was ordered to interview all of the officers assigned to wagon crews on the night in question. *See App. pp. A79-A80, A84.* Sergeant Navarro was to be assisted by Sergeant Frank Stiles—a former Internal Affairs Unit Investigator whose position, at that time, was Superintendent of the Police Division Scientific Services Unit. *See App. p. A88.* Sergeant Stiles was ordered by the Chief of Police to assist in the City Park investigation.

While the testimony of Sergeants Navarro and Stiles was that all wagon crew officers were to be brought in that night, in actuality, the order from Deputy Chief Raymond Vetter was that Officers Nearhood and O'Brien were to be "picked up." *See App. pp. A80, A84.* The only officers picked up from their homes for questioning were Officers Nearhood and O'Brien. *See App. pp. A86-A87.*

As of September 24, 1986, Officers Nearhood and O'Brien were still assigned to the 8:00 p.m. to 4:00 a.m. shift as partners on a wagon crew. *See App. p. A57.* Both Officers Nearhood and O'Brien were on a leave day on September 24, 1986. *See App. pp. A57, A63.* On the afternoon of September 24, Sergeants Stiles and Navarro went to the home of Officer Nearhood and ordered that he get dressed and accompany them downtown. *See App. p. A58.* Officer Nearhood offered to drive himself, but the Sergeants refused to allow it, and stated that Officer Nearhood must ride downtown in the Sergeant's unmarked police vehicle. *See App. p. A58.* Officer Nearhood had been playing with his children and requested the time to quickly shower. *See App. p. A58.* Sergeants Stiles and Navarro refused to permit Officer

Nearhood to do so. *See App. p. A58.* Sergeants Stiles and Navarro left Officer Nearhood's home, and proceeded to Officer O'Brien's home.

After two stops, Officer O'Brien was eventually located at his apartment. *See App. p. A63.* Officer O'Brien had just returned from playing tennis and had begun taking a bath when there was a knock at the door. *See App. pp. A63-A64.* When Officer O'Brien opened the door, Sergeant Stiles entered his apartment and told him that he was to accompany him downtown immediately. *See App. pp. A64,A68.* Officer O'Brien stated that he was in the midst of bathing, and he would report downtown as soon as he finished and dressed. *See App. p. A64.* Sergeant Stiles informed Officer O'Brien that he was to "go upstairs, get dressed and come with us now." *See App. p. A64.* Sergeant Stiles stated that Officer Nearhood was already in the car, and that the Sergeants would wait for him outside. *See App. p. A64.*

Officer O'Brien hurriedly dressed and joined Sergeant Stiles and Navarro and Officer Nearhood in the car and both officers were conveyed to the Safety Building in Downtown Toledo, Ohio, which houses the Police Division. *See App. pp. A59,A64-A65.* Once at the building, the Sergeants drove into "the barn," a garage entrance to the Safety Building, which is used for escorting prisoners into the building and for loading and unloading equipment and evidence. *See App. p. A59.* Once inside the Safety Building, the officers were taken, one by one, into an interrogation room in the Homicide Unit, which doubles as a holding cell for prisoners. *See App. pp. A60-A61, A65.* The Homicide interrogation room is in a different section of the Safety Building than

the Internal Affairs Unit, which was the site of the previous interviews of Officers Nearhood and O'Brien. See App. p. A60.

Officer O'Brien was interrogated first by Sergeants Navarro and Stiles. See App. pp. A60,A65. Officer Nearhood was told to wait on a bench outside the interrogation room. See App. p. A60. During the thirty to forty minute interrogation of Officer O'Brien, Sergeants Stiles and Navarro told Officer O'Brien that he was involved in a felonious assault investigation which could turn into a homicide investigation. See App. pp. A65-A67. Officer O'Brien was asked if he wanted to change his previous statements to Internal Affairs. See App. p. A65. No information was obtained from Officer O'Brien on September 24, which had not been previously brought forth in the previous interviews. See App. pp. A65-A66. Following the interrogation, Officer O'Brien was escorted to the hallway, and subsequently was taken to a second small detention room, where he was held until his release between 10:30 and 11:00 p.m. See App. pp. A66-A67.

Officer Nearhood was taken into the interrogation room. See App. p. A60. As Sergeant Stiles set up tape recording equipment, Officer Nearhood requested that he be given either his *Miranda* rights or the right to talk with a Union representative. See App. p. A61. Initially, Sergeant Stiles indicated that Michael Collins, Vice-President of the Toledo Police Patrolman's Association, could be present for the interrogation. See App. p. A61. Shortly thereafter, Sergeant Navarro informed Officer Nearhood that he had spoken with the Chief, and that it had been determined that Officer Nearhood did not have the right to a Union representative since the interview was pursuant to a "criminal investigation." See App. p. A61. During the interrogation, Sergeants Stiles and

Navarro explored the same information which Officer Nearhood had previously provided in both the oral and the written report that had been filed with Internal Affairs on September 20, 1986. *See App. pp. A61-A62.* No new or conflicting information was elicited as a result of the September 24, 1986 interrogation. *See App. pp. A61-A62.*

The period of time surrounding the September 24, 1986 interrogations was characterized by extreme mistrust and open public hostility toward Toledo police officers. *See App. pp. A79, A84-A85.* The local media perpetuated the allegations of a police assault upon a citizen as if true, and the City was under tremendous pressure from Black activist groups to find the officers allegedly responsible for the violent assault. *See App. pp. A79, A84, A91-A92.* Several weeks after the September 24, 1986 interrogations of Officers Nearhood and O'Brien, four individuals, none of whom were police officers, were charged and ultimately convicted of felonious assault upon the City Park victim. The City Park victim, who hovered near death at the time of the September 24, 1986 interrogations, survived his grave injuries.

REASONS FOR GRANTING THE WRIT

The Decision Of The United States Court Of Appeals For The Sixth Circuit Below Presents An Important Issue Of Law In That It Calls Into Question Whether Police Officers, By Virtue Of Their Employment As Such, Are Relegated To A Lesser Standard Of Protection Of Their Personal Civil Rights And Liberties.

The Courts below erred in applying the defense of qualified immunity as justification for overturning the Federal jury verdict against Respondents Stiles and Navarro. Further, the Court below erred in allowing the dismissal of Municipal Defendants John Mason, former Police Chief, and the City of Toledo. The following brief discussion demonstrates that the errors of the Courts below have left Toledo Police Officers subject to a diluted version of the constitutional rights and liberties afforded every citizen of the United States. This critical issue warrants the consideration of this Honorable Court.

Toledo Police Officers are subject to interrogation in two distinct forums. One forum is within the scope of the Toledo Police Division's authority to conduct internal affairs investigations. Internal affairs investigations are conducted by a separate and distinct unit within the Police Division, and are governed by the terms and conditions set forth in the collective bargaining agreement between the Respondent City and the Petitioner Toledo Police Patrolman's Association (hereinafter referred to as the "TPPA"). See App. pp. A53-A56. The collective bargaining agreement permits the Police Division to compel truthful and potentially incriminating testimony from police officers under threat of employment discipline or discharge. The *quid pro quo* for the Police Division's right to compel incriminating

testimony under threat of discipline is the judicially mandated inadmissibility of compelled testimony in subsequent criminal proceedings. See *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L. Ed. 2d 562 (1967).

The second forum is criminal interrogation, as a suspect to a crime. Any citizen is, upon probable cause, subject to being taken into custody for questioning if he is suspected of committing a crime. The citizen would be entitled to a recitation of his rights prior to questioning, consistent with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A suspect's primary right is the right to remain silent.

The petition at bar results from a collision of the above two forums of interrogation. On September 24, 1986, the Petitioners, Police Officers Charles Nearhood and David O'Brien, were subjected to interrogation pursuant to a homogenized set of rules—a merging of the “internal affairs” standards and the “criminal suspect” standards. The Police Division's veil of internal affairs authority was imposed to the exclusion of the constitutional rights and privileges provided to any citizen of the United States. Petitioners Nearhood and O'Brien were unlawfully seized and detained in violation of Ohio Revised Code Section 2905.03, and were deprived of their constitutional rights and liberty by Respondents, who acted under color of State law in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983.

The first sentence of the opinion below frames the fundamental issue giving rise to this Petition. The opinion of the United States Court of Appeals begins as follows:

Pursuant to an internal affairs investigation into an assault committed in Toledo, Ohio, two Toledo police sergeants picked up two Toledo police officers at their homes, brought them to the police station, and questioned them.

See App. p. 2 (emphasis added). The above passage reflects the erroneous conclusion that Petitioners Charles Nearhood and David O'Brien were called in pursuant to an "internal affairs" investigation, when they were actually seized as suspects in a brutal assault wherein police involvement was alleged by two eyewitnesses.¹

The United States District Court below rushed to the same conclusion that the seizure of Petitioners Nearhood and O'Brien was *per se* a function of internal affairs as evidenced by the following discourse:

This case must be viewed as arising in the employment context. The Court does not suggest that police officers give up any constitutional rights because of choosing to engage in their profession. However, the issue of when and how police officers can be compelled to participate in a criminal investigation in the employment context, as distinguished from their constitutional rights, is anything but clear [...]. The contours of the rights allegedly violated are not sufficiently clear that a defendant would understand objectively his conduct in this case to have violated plaintiff's rights.

¹ Contrary to the impression created in the Court of Appeals opinion below, the September 24, 1986 detention of Petitioners Nearhood and O'Brien was not merely a "call back" to work. Petitioners were not permitted to drive their own vehicles to the Safety Building. See App. pp. A58, A64. Further, although ultimately paid overtime, Petitioners were not permitted to punch the time clock on the way in; rather, they were escorted directly up to the homicide unit interrogation room/holding cell. See App. pp. A90-A91.

See App. p. A18 (emphasis added). The above portion of the District Court's holding presents a paradox. While police officers do not, in theory, forfeit their constitutional rights when they take an oath to protect and serve the public, they do, in practice, forfeit their constitutional rights when interrogated "in the employment context."

In true "employment context" investigations, the collective bargaining agreement between Petitioner TPPA and Respondent City of Toledo permits the City to compel testimony, under threat of discipline or discharge, from officers called before the Internal Affairs Unit. See App. pp. A53-A56. As police officers are "in the business" of law enforcement, virtually any criminal or quasi-criminal situation they could find themselves in might arguably be construed as arising in the "employment context."

Both Courts below erred in interpreting the "employment context" theory as a signal to apply qualified immunity to disallow the federal jury verdict. Respondents are not entitled to invoke the qualified immunity defense. The District Court's conclusion that the "contours" of a police officer's basic constitutional rights are so unclear as to be unascertainable by Respondents is not supportable. Respondents Navarro and Stiles are experienced, trained police sergeants with over thirty-eight years of law enforcement experience between them. See App. pp. A69, A88. Thus, Respondents Navarro and Stiles possessed sufficient knowledge of their wrongdoing to fail this Court's test for qualified immunity set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982):

[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages *insofar as their conduct does not*

violate clearly established statutory or constitutional rights of which a reasonable person would have known.

See *Harlow*, 457 U.S. at 818 (emphasis added; citations omitted). Respondents Navarro and Stiles were not mere "reasonable persons"; they were highly trained law enforcement officers whose job duties required them to know how to lawfully place a citizen in custody.

In *Anderson v. Creighton*, 483 U.S. 587, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), this Court clarified the application of qualified immunity to law enforcement personnel. The relevant inquiry is "whether a reasonable officer could have believed [his actions] to be lawful in light of clearly established law and the information the . . . office[r] possessed." See *Anderson*, 483 U.S. at 641.

As applied to the case at bar, Respondents Navarro and Stiles had investigated the City Park case thoroughly and conducted numerous interviews prior to the September 24, 1986 interrogations of Petitioners Nearhood and O'Brien. Respondent Navarro had even spoken with Petitioners Nearhood and O'Brien prior to September 24, 1986. Respondents clearly had access to sufficient information to determine whether subsequent questioning of Petitioners Nearhood and O'Brien should take the form of an internal affairs interrogation or a criminal interrogation of a suspect. There is no justification for Respondents' utilization of "hybrid" ground rules for the interrogation, employing the most useful aspects of the internal affairs rules (e.g., the ability to coerce incriminating testimony; the veil of intra-departmental authority in a paramilitary organization) and the most useful aspects of criminal interrogation of a suspect (e.g., the right to seize and detain the suspect for questioning; the ability to wield

the threat of criminal prosecution; the ability to use any self incriminating statements in subsequent criminal proceedings).

Simply stated, in the case below, the Respondents, acting in concert and under color of state law, undertook the seizure, detention and interrogation of two citizens. These two citizens were members of a four person class of suspects (*i.e.*, White male police officers assigned to wagon crews in the vicinity of City Park on the night of September 2-3, 1986, who had reported arresting or encountering a Black-male during the course of their shift). See App. p. A93. These two citizens were the only two members of the four person class of suspects seized from their homes by *homicide* investigators (not "internal affairs" investigators) on September 24, 1986—the day after one of the eyewitnesses alleging police involvement had viewed a photo array of Toledo police officers. See App. pp. A86-A87. These two citizens were seized from their homes after they had already submitted to internal affairs interviews and a debriefing by the homicide investigator several days before. See App. pp. A57, A63, A76-A77. Despite the claims of the Respondents at trial, these two citizens—Charles Nearhood and David O'Brien—had every reason to believe that they were being arrested as suspects in the City Park assault.

Had the September 24, 1986 interrogation truly been an internal affairs interview, Officers Nearhood and O'Brien would have been entitled to have a union representative present. See App. p. A56. Instead, Officer Nearhood was explicitly told that he was *not* entitled to a union representative, as the Chief had stated that the interrogation was a "criminal investigation." See App. p. A61. Further compounding the confusion, Officer Nearhood's request for his *Miranda* rights was denied. See App. p. A61.

The foundational issue of the case at bar is that the opinions of the Courts below permit the Respondents to continue their slipshod interrogation practices which effectively blur—indeed, eradicate—the line between the sacrosanct constitutional rights of police officers as citizens and the somewhat diminished rights of police officers compelled to submit to internal affairs interrogations. In the “constitutional” arena, police officers are entitled to the same constitutional rights as the lowest criminal. In the “internal affairs” arena, the police officer’s continued employment is jeopardized by failure to truthfully answer any question, regardless of how incriminating the answer may be. The testimony of Respondent John Mason, then Chief of Police, evidences a Departmental policy permitting the interrogation of police officers by investigators with one foot in each arena:

I think it is inherent in the responsibility of the law enforcement organization and their rights to conduct the business of that association that they have—the administration has the authority to compel a police officer to report to the station house, answer questions, submit to an interview or interrogation with regards to his performance of duty.

See App. p. A6, See also App. pp. A49-A52. Respondent Mason acknowledged that a private citizen could not be taken into custody without probable cause, based upon reasonable information; however, he stated that “a different standard” applied to police officers. *See App. p. A50.*

Contrary to the ruling of the Court of Appeals below, Respondent Mason’s statements fall squarely within the definition of a “policy” or “custom” established by this Court in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690-91, 98 S. Ct. 2018,

56 L. Ed. 2d 611 (1978). *Monell* further provides that where there is a "cause and effect" relationship between an official policy or custom and the government employee's unlawful deprivation of a person's constitutional rights, the government entity itself may be held liable for the employee's actions. See *Monell*, 436 U.S. at 691-92. On this point, *Monell* provides as follows:

It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

See *Monell*, 436 U.S. at 694. Upon the foregoing rationale, this Court held in *Monell* that an official policy which was "the moving force of the constitutional violation [committed by employees] found by the District Court," warranted reversal of the lower court's failure to also find liability on the part of the governmental entity. See *Monell*, 436 U.S. at 694-95.

As applied to the case at bar, *Monell* calls for reversal of the Court of Appeals' Opinion. The policy set forth by John Mason clearly contemplates a lower standard for preserving the rights of police officers arguably involved in criminal investigations. This lower standard disregards the private citizen's right to be free from unwarranted seizure of his person and deprivation of liberty. Acting pursuant to John Mason's policy, Deputy Chief Raymond Vetter ordered Respondents Navarro and Stiles to "pick up" Petitioners Nearhood and O'Brien. Navarro and Stiles followed this order and, as the Federal jury below found, deprived Petitioners of Fourth and Fourteenth Amendment rights pursuant to 42 U.S.C. Section 1983. See App. pp. A13, A35-A36.

Accordingly, Respondent Mason's policy was indeed the policy of the Police Division and the "moving force" behind the actions of Respondents Navarro and Stiles. The Court of Appeals below therefore erred in failing to ascribe liability to Respondents City of Toledo and John Mason.

The interrogation of Petitioners Nearhood and O'Brien is not objectionable solely because of the failure to provide the contractual safeguards and warnings set forth in the collective bargaining agreement. Thus, the Court of Appeals' citation of *Hawk v. Pontiac*, 874 F.2d 347 (6th Cir. 1989), for the premise that a violation of the contract does not amount to a constitutional violation, is inapposite. Similarly, the interrogation is not objectionable solely because of the Respondents' failure to provide *Miranda* warnings. The fact that *Miranda* warnings only serve to invoke the exclusionary rule is not the point. The point is that the Respondents borrowed tactics from internal affairs interrogation methods and from criminal suspect interrogation methods at whim, without providing Petitioners with the protections inherent in either method. The Federal jury below properly determined that Respondents Navarro and Stiles had violated the constitutionally secured rights of Petitioners Nearhood and O'Brien. The District Court erred in overturning the jury verdict and in dismissing the City of Toledo and John Mason as defendants, and the Court of Appeals erred in its affirmation of the District Court's actions.

By adopting the Respondents' simplistic logic that a police officer is on duty twenty-four hours a day, the Court of Appeals merely begs the question of whether the City's limited right to conduct coercive internal affairs interrogations may be used as a subterfuge for

avoiding the constitutional protections owing all citizens. Had Petitioners Nearhood and O'Brien been employed in any profession other than police work, they would not have been removed from their homes without probable cause, they would not have been detained without being charged, and they would not have been interrogated without full appraisal of their rights and their status as suspects.

Only because they were employed as police officers, Petitioners Nearhood and O'Brien were seized, detained and interrogated under the veil of the authority of internal affairs. There was considerable sleight of hand in the Respondents' portrayal of which set of rules applied to the September 24, 1986 interrogation—the constitutional rules or the internal affairs rules. Common sense dictates that a homicide investigator will obtain more information from a police officer under the internal affairs rules than if he gives the officer the right to remain silent. The internal affairs overlay gives the homicide investigator an extra weapon against a police officer-interrogee that is not available against a private citizen. This petition is premised upon the abuse of the internal affairs investigative power. This petition seeks to prohibit future imposition of the internal affairs investigative power to the exclusion of a police officer's fundamental constitutional and civil rights.

CONCLUSION

For all of the reasons stated herein, the Judgment of the United States Court of Appeals for the Sixth Circuit in affirming the District Court's Entry of Judgment Notwithstanding the Jury Verdict must be reversed. The Petitioners, Toledo Police Patrolman's Association, Local 10, I.U.P.A., Charles Nearhood and David O'Brien respectfully pray that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to examine the important legal issues raised by the case below, and to review the errors of law made below.

Respectfully submitted,

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**ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

(Filed June 1, 1990)

[NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION Sixth Circuit Rule 24 limits citation to
specific citations. Please see Rule 24 before citing in a
proceeding in a court in the Sixth Circuit if cited, a copy
must be served on other parties and the Court.

This notice is to be *prominently* displayed if this revision
is reproduced.

No. 89-3524

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**TOLEDO POLICE PATROLMAN'S
ASSOCIATION, et al.,
*Plaintiffs-Appellants,***

v.

**CITY OF TOLEDO, et al.,
*Defendants-Appellees.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO.**

**BEFORE: WELLFORD and Boggs, Circuit Judges;
and GILMORE, District Judge.***

* The Honorable Horace W. Gilmore, United States District Judge
for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Pursuant to an internal affairs investigation into an assault committed in Toledo, Ohio, two Toledo police sergeants picked up two Toledo police officers at their homes, brought them to the police station, and questioned them. The two police officers, along with the police union, on behalf of all similarly situated police officers, sued the two sergeants, the Toledo Police Chief, various Toledo city officials, and the city of Toledo itself, alleging that the sergeants' actions violated the police officers' constitutional rights.

The district court directed a verdict for the Police Chief, city officials, and the city, finding that the sergeants' actions were not based on a municipal policy. The district court granted judgment NOV for the two sergeants, finding that they did not violate clearly established constitutional rights, and thus were entitled to immunity for their actions. The district court also imposed sanctions against the plaintiffs for a discovery violation. The plaintiffs appealed all three rulings. Finding no error in the decision of the district court, we affirm it in all respects.

I

On or about September 3, 1986, a pedestrian was assaulted in a park in Toledo, Ohio. On that evening, Officers Charles Nearhood and David O'Brien of the Toledo Police Department were assigned as partners in a van to patrol a section of Toledo that included the park.

Sergeant Ronald Navarro of the Toledo Police Department was assigned to investigate the assault. During the course of the investigation, one witness stated that he had seen two police officers "using their night sticks to hit a black male." Another witness indicated that he had observed a van in a parking lot

along the side of the park, and presumed that it was a police van; however, it apparently did not have Toledo police markings.

On September 20, 1986, Navarro interviewed both Nearhood and O'Brien in connection with the investigation. At that time, Navarro reviewed the "dispatch cards" and the officers' activities for the night of September 3. On September 22, 1986, both officers were ordered to report to Internal Affairs. At that time, Lt. Thomas Gulch asked them to complete a supplemental report about their activities.

On September 24, 1986, Deputy Chief of Police Vetter determined that it was necessary to interview all members of van patrols immediately, beginning with Nearhood and O'Brien. On that day, both Nearhood and O'Brien were on leave, and were not scheduled to return for two days. Deputy Chief Vetter determined that questioning could not be delayed that long. Both Nearhood and O'Brien admit that Toledo police officers are subject to being recalled to active duty at any time.

That same afternoon, Navarro and Sgt. Frank Stiles went to Nearhood's home and ordered him to get dressed and come downtown with them. Nearhood offered to drive, but Navarro and Stiles rejected this suggestion. Navarro, Stiles, and Nearhood then drove to O'Brien's home.

While Nearhood waited in the car, Navarro and Stiles went into O'Brien's home and asked O'Brien to come downtown with them. O'Brien had apparently finished playing a game of tennis, and wanted to shower first. Navarro and Stiles refused to allow him to do this, and after several protestations by O'Brien, O'Brien got dressed and went to the Toledo Safety Building with Navarro, Stiles, and Nearhood.

Nearhood and O'Brien were taken through the basement of the building (a route apparently used to escort prisoners into the building) and into an interrogation room which is commonly used as a holding cell for prisoners. This interrogation room is in a different part of the Safety Building from the Internal Affairs Section, the site of the previous interviews.

Apparently, Nearhood and O'Brien were interviewed separately. Stiles indicated to Nearhood that the interview was to be taped. Nearhood requested either that he be given a *Miranda* warning, or that he be allowed to talk with a representative from the Toledo Police Patrolman's Association, Local 10, I.U.P.A., the local police union. Initially, Stiles stated that the president of the police union would be present. A short time later, however, Navarro told Nearhood that he had spoken with John Mason, the Chief of Police, who concluded that Nearhood did not have the right to have a union representative present, since this was a "criminal investigation."

O'Brien asserts that, during his interview, Stiles and Navarro attempted to "intimidate" him by telling him that he was involved in a felonious assault investigation which would turn into a homicide investigation. No criminal or administrative charges, however, were brought against either O'Brien or Nearhood. Both O'Brien and Nearhood, ultimately, after protest, received overtime pay for the hours involved in transportation and questioning.

On October 8, 1986, the police union, O'Brien, and Nearhood, on behalf of all similarly situated police officers, sued Stiles, Navarro, Mason, the City of Toledo, and various city officials for deprivation of liberty without due process of law and for an unreasonable seizure. The plaintiffs also sued for the tort of false arrest under Ohio law.

The defendants filed a motion to compel discovery on January 27, 1988. Apparently, the defendants served this motion in a large box of documents which, although related to the case, were unrelated to the specific motion. Plaintiffs apparently overlooked the motion and failed to respond. On February 23, the court ordered plaintiffs to produce the requested discovery by February 28, but the plaintiffs still did not respond. Defendants filed a motion for sanctions on March 3, 1988, premised on plaintiffs' failure to respond to their motion to compel discovery. Apparently, plaintiffs provided the discovery on March 10. On March 18, however, the court granted the defendant's motion for sanctions.

The case went to trial. At the conclusion of the plaintiffs' case, defendants moved for a directed verdict. They argued that, inter alia, no policy or custom existed which would implicate Mason, the city of Toledo or city officials in the actions of Stiles and Navarro. The court directed a verdict for these defendants.

The case against Stiles and Navarro proceeded to the jury. The jury found that these police sergeants had violated the plaintiffs' fourth and fourteenth amendment rights, in violation of 42 U.S.C. § 1983. The jury, however, returned a verdict for the defendants on the plaintiffs' false arrest claims under Ohio law. The defendants then moved for judgment NOV.

The court granted defendant's motion for judgment NOV, stating that the interview occurred in the employment context, and that any constitutional rights that were violated in this context were not so clearly established so as to deprive Stiles and Navarro of immunity for their actions. The plaintiffs timely appealed.

II

The court directed a verdict for Mason, the city of Toledo, and city officials. The court had found that no policy or custom existed that would implicate these defendants in the allegedly illegal actions of Stiles or Navarro. *Monell v. Department of Social Services of the City of New York, et al.*, 436 U.S. 658 (1978). The plaintiffs assert that this finding is erroneous, since, at trial, Mason said that

I think it is inherent in the responsibility of the law enforcement organization and their rights to conduct the business of that association that they have—the administration has the authority to compel a police officer to report to the station house, answer questions, submit to an interview or interrogation with regards to his performance of duty.

The plaintiffs assert that Mason's statement creates a "policy or custom" under *Monell*, and thus implicates Mason, the city, and certain city officers in the allegedly illegal actions of Stiles and Navarro. We disagree.

Mason's statement simply points out that police officers may be called to duty at any time, and, as a part of that duty, may be questioned about their activities. Such questioning, absent more, is certainly not illegal, and is consistent with the duties of a police officer. Even assuming that Mason's statement does create a city policy, any illegal action allegedly committed by Stiles or Navarro (such as a failure to give a *Miranda* warning) is not explicitly within this policy as stated by Mason. Thus, viewing the evidence in the light most favorable to the plaintiffs, and giving them the benefit of all reasonable inferences, we find that the district court did not err by directing a verdict for Mason, the city of Toledo, and the named city officials.

III

On appeal, the plaintiffs contend that the district court erred in granting judgment NOV to Stiles and Navarro. We disagree. The district court correctly found that the interviews were performed in the employment context. The officers were paid overtime for their participation, and it was clearly part of their duties as Toledo police officers to participate fully in internal investigations. See Toledo Municipal Code, §2129.19.C.

The plaintiffs contend that the interviews, if done within the employment context, violated a number of provisions in the Toledo Municipal Code, §2129.19:

A. An employee has the right to the presence of counsel and/or a representative of his recognized bargaining unit. . . .

B. An employee who is to be questioned as a suspect in any investigation of any criminal charge against him shall be advised of his Constitutional Rights before any questioning.

C. Before an employee may be charged with any violation of the Divisional Rules and Regulations for a refusal to answer questions or participate in an investigation, he shall be advised that his refusal to answer questions, or participate in such investigation, may be made the basis of such a charge.

D. Any interrogation, questioning or interview shall be conducted at a reasonable hour, preferably while the employee is working. . . .

* * *

M. When any employee is to be interviewed in an investigation of any other member of the Police Division, such interview shall be conducted in accordance with the procedures established herein.

As an initial matter, it is not clear that a violation of these municipal code provisions (if, in fact, a violation occurred) rises to the level of a denial of constitutional

due process. See *Hawks v. City of Pontiac*, 874 F.2d 347 (6th Cir. 1989). Even if a violation did occur, and it was of constitutional dimensions, these constitutional rights were not so "clearly established" as to deprive Navarro and Stiles of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

We find no support for plaintiffs' allegation that the officers were under arrest. In any event, a failure to give *Miranda* warnings is not an independent constitutional tort, but rather serves only to exclude evidence taken in the interview. See *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436, 1442 (8th Cir. 1989). Thus, Stiles and Navarro cannot be held liable for a failure to give the warning. Viewing the evidence in the light most favorable to the plaintiffs, and giving them the benefit of all reasonable inferences, the district court did not err in granting judgment NOV to Stiles and Navarro.

IV

The plaintiffs also argue that the district court abused its discretion when it imposed sanctions under Rule 37 (b), Fed. R. Civ. P. In particular, they contend the district court should have taken into account the difficulties both parties had in completing discovery within the given time frame. Further, they note that the defendants had served their January 27, 1988 motion to compel discovery upon plaintiffs in a large box, full of unrelated records from Internal Affairs which plaintiffs had requested. The plaintiffs contend that they could not have noticed the motion in time, unless they had immediately examined all the documents which were sent.

Upon review of the record, however, we cannot say that the district court abused its discretion in imposing sanctions. We note that the defendants' request for discovery was filed in July 1987; the plaintiffs should

have been on notice at that time that certain information was desired by the defendants. On January 27, 1988, the defendants moved for an order compelling discovery; the plaintiffs contend that they overlooked this motion in a large box of documents.

Even if the plaintiffs' failure to find this motion can be excused, they recieved another reminder of their failure to provide discovery on February 23. On this date, the district court issued an order to provide discovery, ordering compliance within five days. February 28 was a Sunday. The plaintiffs waited until Monday, February 29 to object to the discovery or request an extension.

The court overruled the plaintiffs' objections and denied the request for an extension. The plaintiffs provided the requested discovery on or about March 10. Although the plaintiffs provided the discovery prior to the imposition of sanctions, they only provided it after failing to comply with the district court's specific order to provide discovery within five days of February 23. Accordingly, the imposition of sanctions is affirmed.

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**MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT**

(Filed August 22, 1988)

Case No. 86-7755

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Toledo Police Patrolman's Association,
Local 10, I.U.P.A., et al.,
Plaintiffs,

vs.

City of Toledo, et al.,
Defendants.

MEMORANDUM AND ORDER

POTTER, J.:

This cause is before the Court on defendants' motion for judgment notwithstanding the verdict or for a new trial and plaintiffs' opposition. Defendants' first motion was filed prior to the entry of judgment and is hereby stricken from the record.

Defendants have asserted qualified immunity as an affirmative defense in this case but have never properly placed the issue before the Court for a ruling. "Once the issue of qualified immunity is properly injected in the case either by a motion to dismiss, an affirmative defense, or a motion for summary judgment, the plaintiff is obliged to present facts which if true would constitute

a violation of clearly established law." *Dominique v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987)" "Regardless of the stage at which the issue of qualified immunity is addressed, the district court should indicate the clearly established right at issue and the factual basis for its conclusion that a genuine issue exists as to the commission of acts violating that right. *Dominique* [sic]. 831 F.2d at 677." *Poe v. Haydon*, No. 87-5377, Slip op. at 13 (6th Cir. July 28, 1988). In light of these recent Sixth Circuit opinions, the Court believes that where immunity is pleaded as an affirmative defense it is mandatory that the issue be addressed by the trial court whether it is formally pursued by defendants or not.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants supplement their brief in support of the motion for judgment n.o.v. to address the issue of qualified immunity within thirty days of the date of this order.

JOHN W. POTTER
United States District Judge

**MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT**

(Filed May 18, 1989)

Case No. C 86-7755

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Toledo Police Patrolman's Association,
Local 10, I.U.P.A., et al.,
Plaintiffs,

vs.

City of Toledo, et al.,
Defendants.

MEMORANDUM AND ORDER

POTTER, J.:

This cause is before the Court on defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, plaintiffs' opposition, defendants' supplemental memorandum, plaintiffs' supplemental opposition and defendants' reply. Upon defendants' original motion becoming decisional, the Court ordered supplemental briefs filed on the issue of whether the defendants are immune under the doctrine of qualified immunity. Because the Court ordered supplemental briefs, it was necessary for the parties to obtain a transcript of the proceedings had before the jury. This, and a substitution of counsel for plaintiffs'

ultimately resulted in a lengthy delay which could not have been foreseen at the time the order was issued and which was unavoidable thereafter. The importance to the parties of the issue of qualified immunity raised by the Court necessitated having a complete record, as well as the thorough briefs which have been submitted, the last of which was filed on March 6, 1989 whereupon this matter became decisional.

This cause was tried to a jury on plaintiffs' claims under 42 U.S.C. §1983 for deprivation of liberty without due process and under Ohio state law for the tort of false arrest. The jury found that defendants had not falsely arrested plaintiffs, but found that defendants had deprived plaintiffs of Fourth and Fourteenth Amendment rights in violation of 42 U.S.C. §1983.

The motion for judgment notwithstanding the verdict must be granted if there was insufficient evidence in the record to present a question of fact for the jury's consideration. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied* 441 U.S. 906 (1979).

In determining whether the evidence is sufficient to support the verdict, this court may neither weigh the evidence, pass on the credibility of witnesses, nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in that party's favor.

Beauford v. Sisters of Mercy, 816 F.2d 1104, 1107 (6th Cir.), *cert. denied*, 108 S. Ct. 259 (1987) (citing *Morelock*, 586 F.2d at 1104). Therefore, a motion for judgment n.o.v. must be granted when the evidence is such that there can be but one reasonable conclusion as to the

proper verdict. *Id.* at 5 (citing *National Polymer Products, Inc. v. Borg-Warner Corp.*, 660 F.2d 171, 177-78 (6th Cir. 1981)).

The Court concludes that the resolution of this case and the claims of plaintiffs for monetary damage against defendants in their individual capacity turns on the issue of qualified immunity. Resolution of the issue of qualified immunity "is purely a matter of law for the trial judge to determine. . . ." *Dominique v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987). the law is well set out in *Telb* and in *Poe v. Haydon*, 853 F.2d 418, 423-424 (6th Cir. 1988), as follows:

Government officials performing discretionary functions are afforded qualified immunity, shielding them from civil damages, as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2735, 73 L.Ed.2d 396 (1982). Thus, whether an official "may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, _____ U.S. _____, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) (citations omitted).

In *Anderson v. Creighton*, _____ U.S. _____. 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court elaborated on the level of generality at which legal rights are "clearly established." The Court pointed out that it would be improper to look at the legal right in the abstract in determining whether the law was clearly established at the time of the defendant's alleged violation.

...

The relevant inquiry focuses on whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions. *See id.* at _____, 107 S.Ct. at 3039-40.

Poe, 853 F.2d at 423-424.

A public official performing a discretionary function is entitled to qualified immunity unless the contours of the right that the official allegedly violated are "sufficiently clear that a reasonable official would understand that what[he or she] is doing violates that right." *Anderson*, 107 S.Ct. at 3039. This inquiry is necessarily "fact-specific," *id.*, and focuses on "the circumstances with which [the official is] confronted." *id.*; *see Malley v. Briggs*, 475 U.S. 33, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986) ("Under the *Harlow* standard . . . an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner."). Because qualified immunity turns on the defendant's actual conduct, the district court should examine all the evidence available to it in determining what that conduct was.

Green v. Carlson, 826 F.2d 647, 651 (7th Cir. 1987).

The question which the Court must resolve is whether, under the circumstances, defendants deprived plaintiffs of rights under the Fourth and Fourteenth Amendments. Specifically, whether the conduct of defendants amounted to a seizure and detention of constitutional proportion and not whether the conduct was egregious, improvident or violated a collective bargaining contract. The unique aspect of this case is that plaintiffs and defendants are all police officers employed by the City of Toledo. Plaintiffs are patrol officers who, on September 3, 1986 were assigned to patrol an area of the City where an individual was assaulted. A witness implicated police officers in the assault. Defendants are police sergeants who were

assigned to investigate the assault. On September 24, 1986 it was determined by Chief Vetter, who was not made a party to this action, that it was necessary to question plaintiffs immediately in regard to the investigation. Defendants drove to plaintiffs' homes during plaintiffs' off-duty hours and relayed the order for them to come immediately to police headquarters, whereupon plaintiffs were questioned about the incidents of September 3, 1986. No criminal or administrative charges were ever brought against plaintiffs. Plaintiffs received overtime pay for the hours involved in the transportation and questioning.

Plaintiffs' claims do not arise from merely being questioned about the matter of the assault. Both plaintiffs had been questioned about the incident on September 20, 1986. They assert that the September 20 questioning did not violate constitutional rights because it was conducted by defendant Navarro in an open room with an Internal Affairs Division Officer present. Plaintiffs claim that constitutional violations occurred from the peremptory manner in which they were treated on September 24, 1986, and because they were questioned in the more restrictive environment of the homicide interrogation room. Plaintiffs claim they felt they were not free to leave on September 24 because of the threat of adverse employment consequences.

Plaintiffs acknowledge that as police officers they are subject to be recalled to duty without notice, 24 hours a day. One issue here is whether a reasonable police sergeant, under orders to pick up off-duty patrol officers as soon as possible, could have believed it lawful to carry out those orders. *Poe*, 853 F.2d, 418. Both defendants were ordered to remain on duty the evening of September 24, 1986, beyond the end of their own regular duty hours for the purpose of interviewing the wagon crews. The evidence shows that Chief Vetter instructed

defendants to pick up the plaintiffs and transport them downtown to expedite the investigation. Plaintiffs were not scheduled for regular duty shifts for two more days and Chief Vetter had determined that the questioning could not be delayed for that length of time. There is no dispute that on-duty officers could have been ordered to report immediately for questioning.

As indicated above, there are two questions to resolve in determining the application of qualified immunity; first, whether the conduct violated a clearly established constitutional right and, second, "if so, whether the individual defendants should reasonably have been aware of that right at the time of their actions." *Washington v. Starke*, 625 F. Supp. 1149, 1153 (W.D. Mich. 1986).

The Court finds as a matter of law that defendants' conduct did not violate a clearly established constitutional right of the plaintiffs.

While the Court need not, in view of the finding above, determine "reasonableness"; nevertheless, based on the undisputed evidence before the court, it is the finding of this Court that a reasonable police officer in the position of defendants could have believed his conduct to be lawful, considering the state of the law and circumstances as they existed when he took the challenged actions. *Poe* 853 A.2d at 427.

Plaintiffs' assertion that this was not the ordinary duty recall is noted. However, plaintiffs stop short of contending that they were arrested for the purpose of being charged with a crime. Plaintiffs were not charged criminally or subjected to administrative charges in the employment context. Plaintiffs were paid for the time involved. Thus, plaintiffs' attempt to characterize the incident as an unlawful arrest within the meaning of the Fourth Amendment is not well taken. The same result was reached by the jury as to plaintiffs' claims of false arrest under state law. Further, the Court cannot look at

the conduct retrospectively, but must view the conduct of defendants on an objective basis from a point prior to or concurrent with the actual action taken. This also demonstrated why plaintiffs' argument about Miranda warnings is not applicable here. An absence of a proper warning in a criminal investigation is not a constitutional violation in itself. Even assuming that plaintiffs were suspects, the failure to read them their rights would not amount to an independent constitutional tort, but would invoke the exclusionary rule in a subsequent criminal proceeding against them as the remedy for procedurally deficient questioning.

This case must be viewed as arising in the employment context. The Court does not suggest that police officers give up any constitutional rights because of choosing to engage in their profession. However, the issue of when and how police officers can be compelled to participate in a criminal investigation in the employment context, as distinguished from their constitutional rights, is anything but clear. The contours of those rights are not for this Court to determine here. The contours of the rights allegedly violated are not sufficiently clear that a defendant would understand objectively his conduct in this case to have violated plaintiff's rights. And as stated above, no constitutional issue is implicated under the facts of this case.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion for judgment notwithstanding the verdict be, and hereby is, GRANTED; and it is

FURTHER ORDERED that judgment be entered in favor of defendants on plaintiffs' claims under 42 U.S.C. §1983.

JOHN W. POTTER

United States District Judge

**MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT
GRANTING PLAINTIFFS MOTION
TO CERTIFY AS A CLASS**

(Filed November 19, 1987)

Case No. C 86-7755

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Toledo Police Patrolman's Association,
Local 10, et al.,
Plaintiffs,

vs.

City of Toledo, et al.,
Defendants.

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on plaintiffs' motion to certify the class. Pursuant to Fed. R. Civ. P.23, plaintiffs seek to certify this class as all of the Toledo police officers, trainees, and probationary officers who are members of the Toledo Police Patrolman's Association (TPPA) bargaining unit. In this proceeding, plaintiffs contend that defendants unlawfully detained the individual plaintiffs and subjected those individuals to deprivations of their constitutional rights. The individuals seek monetary damages. The TPPA and the individuals seek injunctive relief restraining defendants from subjecting the class to the alleged constitutional violations.

Pursuant to Fed. R. Civ. P. 23(a)

[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Although the court has broad discretion in determining the applicability of Fed. R. Civ. P. 23(a), the application of these four requirements "should not be so strictly applied that the policies underlying class action would be undermined." *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974).

To satisfy the prerequisites for maintaining a class action "[t]here must be an adequate statement of the basic facts to indicate that each requirement is fulfilled." *Id.* The TPPA bargaining unit consists of over 560 persons. *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972) (approximately 300 sufficient to meet numerosity requirement). Therefore, the class is so numerous that joinder of all members is impracticable.

The second requirement requires that there must be questions of law or fact common to the class. Under the relaxed standard of the Ninth Circuit, "the commonality requirement will be . . . met when as few as one common issue of law or fact is present among members of the proposed class." *International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457, 462 (N.D. Cal. 1983). In this proceeding, plaintiffs have alleged that defendants have acted or will act in a

uniform manner with respect to the class. *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir.), cert. denied, 429 U.S. 870 (1976). Although there may be different factual situations involving members of the proposed class, in light of the numerous common issues of law and fact, plaintiffs have satisfied the commonality requirement.

The typicality requirement is to assure that the class representatives are typical with those of the class. *Id.* at 463. Therefore, "if the class representatives demonstrate that their claims and those of the class 'are sufficiently parallel to insure a vigorous and full presentation of all potential claims for relief'" the third prerequisite is satisfied. *Id.* TPPA's claims as class representatives are the same as the claims of the class, these claims are sufficiently parallel to satisfy the typicality requirement.

The adequacy of representation is satisfied when "the representative class members are represented by qualified counsel and the named representatives' interests are not antagonistic to the interest of the class." *Id.* at 464 (citing *Social Services Union, Local 535 v. Santa Clara County*, 609 F.2d 944, 947 (9th Cir. 1979)). Since the TPPA has met the association standing under *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), and since neither the claim asserted nor the type of relief requires the participation of individual members of the class, the fourth prerequisite is satisfied.

After the fourth requirement of Fed. R. Civ. P. 23(a) are satisfied, the plaintiff must establish a ground for the maintenance of the class action under Fed. R. Civ. P. 23(b). Under Fed. R. Civ. P. 23(b)(2), a party must maintain a class action if the party opposing the class has acted or refused to act on grounds generally

applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the call as a whole." Fed. R. Civ. P. 23(b)(2). Although the individual plaintiffs seek monetary damages, this does negate the applicability of Fed. R. Civ. P. 23(b)(2). *Weathers*, 499 F.2d at 1200. Therefore, since plaintiffs challenge police procedures applicable to the class as a whole and injunctive relief would be appropriate, the Court determines that plaintiffs have satisfied the requirements of Fed. R. Civ. P. 23(b)(2).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion to certify the class be, and hereby is, GRANTED.

John W. Potter
United States District Judge

**MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT
GRANTING PLAINTIFFS MOTION
TO COMPEL DISCOVERY**

(Filed November 19, 1987)

Case No. C 86-7755

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Toledo Police Patrolman's Association,
Local 10, et al.,
Plaintiffs,

vs.

City of Toledo, et al.,
Defendants.

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on plaintiffs' motion to compel, defendants' motion for a protective order, and plaintiffs opposition to defendants' motion for protective order. The individual plaintiffs and the Toledo Police Patrolman's Association contend that defendants unlawfully detained the individual plaintiffs and subjected these individuals to deprivations of their constitutional rights. These alleged constitutional deprivations occurred during a police investigation of an assault which took place in City Park. The individual

plaintiffs are police officers who were on duty in the City Park vicinity the night of the assault. These plaintiffs were allegedly detained and questioned by the internal affairs unit of the City of Toledo Police Department. As a result of the detention and questioning, the present proceeding was instituted, pursuant to 42 U.S.C. §1983, alleging deprivations of constitutional rights under color of state law.

During the pretrial discovery, plaintiffs served an amended notice to take deposition and request for production of documents. At the scheduled deposition the deponent refused to comply with paragraph 1 of the request and the deponent refused to answer questions concerning the investigation of plaintiffs Nearhood and O'Brien conducted by the Internal Affairs Unit.¹

Plaintiffs contend that the discovery they seek is essential to the case and that the material sought is within the scope of the rules for discovery. Defendants have asserted a claim of executive privilege to these discovery requests. Federal R. Civ. P. 26(b)(1) provides:

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

When a party's objection to discovery is based on a claim of privilege, the party claiming the privilege has the burden to establish the existence of the privilege. *Urseth v. City of Dayton*, 110 F.R.D. 245, 252 (S.D. Ohio

¹ Paragraph 1 of the request for production of documents requested: Any and/or all documents related to any and/or all Internal Affairs investigations of Nearhood and O'Brien.

1986). Since this action is based on a federal statute, the existence of a privilege in this proceeding is governed by federal law. *Spell v. McDaniel*, 591 F. Supp. 1090, 1119 (N.D.N.C. 1954). However, "since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds." *Hickman v. Taylor*, 392 U.S. 495, 506 (1947).

Notwithstanding *Knott v. Perini*, 283 F. Supp. 1 (N.D. Ohio 1968), where police investigation records were accorded an absolute executive privilege which is distinguishable from the present proceeding, the apparent trend is to give law enforcement internal affairs investigation reports and files a qualified executive privilege. *Tyner v. City of Jackson*, 105 F.R.D. 564, 566 n.2 (S.D. Miss. 1955). Therefore, the existence of the privilege must be determined on a case-by-case basis. *Urseth*, 110 F.R.D. at 253. "Only if the damage to the executive department or to the public interest from disclosure significantly outweighs the harm to the plaintiff from nondisclosure will the privilege be upheld." *Id.*

In *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973), the court discussed ten factors to consider in evaluating the necessity for qualified executive privilege. These factors are:

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- (2) The impact upon persons who have given information of having their identities disclosed;
- (3) The degree to which governmental selfevaluation [sic] and consequent program improvement will be chilled by disclosure;

- (4) Whether the information sought is factual data or evaluative summary;
- (5) Whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- (6) Whether the police investigation has been completed;
- (7) Whether any intra-departmental disciplinary proceedings have arisen or may arise from the investigation;
- (8) Whether the plaintiff's suit is non-frivolous and brought in good faith;
- (9) Whether the information sought is available through other discovery or from other sources; and
- (10) The importance of the information sought to the plaintiff's case.

Id. at 344.

The courts have determined that the rare instances of disclosure pursuant to a court order would not deter citizens from revealing information to the police. *Id.* Therefore, defendants' arguments concerning the chilling effect that disclosure would have on citizens voluntarily coming forward is not dispositive. Furthermore, as a consequence of the requirements of their positions, the police officers will continue to cooperate with law enforcement officials. However, this Court will not require defendants to disclose any information regarding governmental self evaluation which may be connected with plaintiffs' investigation. Moreover, although not dispositive of the issues, this Court is cognizant of plaintiffs' willingness to permit this material to be discovered in this proceeding. Therefore, after consideration of these factors and the case law, the Court determines that defendants' claim of qualified executive privilege is not well taken. However, the Court will

restrict the use of this material to use within this present proceeding. Therefore, plaintiffs shall not disclose the contents of the material and documents to any other person not involved in this litigation except by order of this Court.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion to compel be, and hereby is GRANTED; and it is

FURTHER ORDERED that defendants' motion for protective order be, and hereby is, DENIED.

John W. Potter
United States District Judge

[286] ORAL RULING OF THE DISTRICT COURT
MARCH 30, 1988

* * *

MR. DAVIS: Your Honor, all defendants at this time would request the Court to grant a directed verdict in this case. We have basically the following arguments to make in that regard.

[294]

* * *

THE COURT: All right. Your motion will be granted as to the City and Chief Mason. All right. Now, the other two will be overruled. Now, do we have anything further?

MR. DAVIS: Not at this time, Your Honor. I would request a brief recess additionally also.

THE COURT: You will have a chance. All right. I'm going to discharge then the City of Toledo and Chief Mason. Thank you.

(Thereupon, court recessed at 3:28 o'clock p.m.)

* * *

(3:30 o'clock p.m.)

(Thereupon, the following proceedings were had in the presence and hearing of the jury.)

MR. DAVIS: Your Honor, we would call Sergeant Ron Navarro to the stand, please.

THE COURT: All right, I should tell the jury, the city of Toledo and John Mason are no longer defendants in this [295] lawsuit. This is a matter for the Court's decision. You should not draw any inference from the fact that they're no longer parties. All right. The remaining defendants for your consideration are Sergeant Stiles and Navarro.

[333] ORAL RULING OF THE DISTRICT COURT
MARCH 31, 1988

* * *

(10:07 O'clock a.m.)

THE COURT: Again, thank you for your patience. The Court and lawyers are frequently at work, but two matters. Yesterday, I mentioned that I had dismissed the City and Mr. Mason from this case.

The city is dismissed from the allegations relative to constitutional violations. The City is still in the case in regard to the allegations of false arrest.

You remember there are two counts, so I misspoke as to both of these counts. The City is still in the case in the state pendant claim of alleged false arrest but not as to the constitutional claims which involve the Fourth Amendment and the Fourteenth Amendment.

Mr. Mason is out on both counts, and I told you then that you're not to draw any inference from this. This is strictly a matter for the Court.

[468] THE COURT: Yes. You have something though that you want to bring to my attention before we do that?

MR. ZOLL: No.

MR. DAVIS: We do have a motion, Your Honor.

THE COURT: All right.

MR. DAVIS: We would move for a directed verdict again at this time on the basis of the City and the two remaining defendants for the reasons that we basically indicated before which is to say that the necessary restraints and tension has not been shown. In fact, the evidence shows that the individuals voluntarily accompanied Sergeants Stiles and Navarro and consented to stay on.

There has been no evidence to indicate that those defendants were the proximate cause of any damages, and in fact, the only damages that have been shown have been shown to have been basically caused by the remarks of members of the plaintiff class, fellow police officers who were members of the plaintiff union.

We would request the Court to grant a directed verdict on that basis.

THE COURT: You want to state anything for the record?

MR. ZOLL: No.

[469] THE COURT All right. I'm going to overrule your motion and let this matter go to the jury. Of course, depending on what the jury does, you can come back again with a motion notwithstanding. Perhaps at that time you may convince me if you have excerpts from the transcript. All right.

(Thereupon, discussion was had off the record.)

(Thereupon, court recessed at 4:20 o'clock p.m.)

**[470] ORAL RULING OF THE DISTRICT COURT
APRIL 1, 1988**

April 1, 1988

10:10 o'clock a.m.

THE COURT: We're in chambers, I believe either Wednesday or Thursday I dismissed the city on a constitutional claim and false arrest. Counsel for the plaintiffs Thursday morning suggested that this was error because under the false arrest charge, the city could be held in a respondeat superior.

The court agreed with that decision and put the city back, however, counsel for the government—for the City of Toledo has in the Court's opinion properly illustrated that this is an intentional tort and, therefore, the City cannot be liable either for compensatory damages or punitive damages.

The Court agrees with that and therefore will again dismiss the City of Toledo which will leave us with two individual defendants.

Now, counsel for plaintiff, do you wish to state your objection?

MR. ZOLL: Well, yes, Your Honor. As we discussed off the record, we oppose the actions of the Court on the motion and feel that there is under the law under the theory of vicarious liability or respondeat superior responsible for the city by its action.

There has been direct evidence that Chief Vetter ordered these men to do what they did and certainly he was a man in authority, agent of the city. These men acted in their official (471) capacities to do what they did. They followed their orders, and even though they were in violation of my clients' constitutional rights and their state law rights, they were acting as agents of the city and therefore it's our position the city's responsible.

THE COURT: Anything further? Do you want to state anything further as to your position on the law?

MR. DAVIS: Not on that matter, no, Your Honor.

THE COURT: All right. That will be my order. Now, what else do you have?

MR. DAVIS: Did the Court want to discuss the charge again?

THE COURT: I believe now that you know enough about the charge to give your closing argument.

MR. DAVIS: I think so.

THE COURT: Let's have the closing argument and you work on the charge while we are—half hour a side.

MR. ZOLL: Judge, I would like to make a motion for directed verdict at this time on behalf of the plaintiffs. I feel that we have established that there has been a false arrest and that at least on that issue that we are entitled to directed verdict.

THE COURT: All right. Thank you. Do you want to make take statement on that?

MR. DAVIS: Obviously, we oppose that, Your Honor. I think—Greg, you want to argue?

[472]

MR. MERRITT: I think there is plenty of evidence that these people were not even under arrest, that they were called back as a result of their employment duties and that's an issue for the jury to decide.

THE COURT: All right. Thank you. Your motion will be overruled. Now, anything further before closing argument?

MR. ZOLL: Judge, I would like to know what the position is of the Court with regard to the instruction before we argue.

THE COURT: On what point?

MR. ZOLL: Is it my understanding that there's going to be a charge on punitive damages?

THE COURT: There will be a charge on punitive damages for the individual defendants. The city are the only people, left so there will be punitive damages under false arrest and constitutional 1983 claim.

MR. ZOLL: So the charge will be just as it was as we reviewed it with Walter for that.

THE COURT: Take out the city now.

MR. DAVIS: I don't know whether we were on the record or not, Judge, I don't recall, but we had requested directed verdict on the issue of punitive damages as to the individual defendants also because of the lack of evidence.

THE COURT: I believe we were. In any event you can renew it now.

[473] MR. DAVIS: Renew now?

THE COURT: Your motion is directed verdict for the remaining defendants on all the issues, is that correct?

MR. DAVIS: Well, we had made that originally and we would renew that, and I would also submit to the Court to add to that that there's no evidence to show any conduct warranting an award of punitive damages against them as well and we would ask—

THE COURT: All right. You may make that. I will save your right for judgement notwithstanding. And that will be overruled.

MR. DAVIS: All right.

THE COURT: Ready?

MR. ZOLL: Yes.

* * *

10:22 o'clock a.m.

THE COURT: Thank you very much. As you know we have more than one thing to do. We have a criminal docket and a civil docket, and sometimes they get in the way of each other, so we appreciate again your patience.

The other day I mentioned that I dismissed the City of Toledo but retained them on the false arrest charge. Now, the Court will dismiss the City of Toledo from the false arrest charge and from the constitutional violation charges. Again, I instruct you to draw no inference from this. This is a matter [474] for the Court to determine.

We will now hear the closing arguments of counsel, and after you have heard the closing arguments, I will instruct you as to the law.

ORDER OF THE UNITED STATES
DISTRICT COURT

(Filed April 19, 1988)

JUDGMENT IN A CIVIL CASE

Docket Number C 86-7755

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT—WESTERN DIVISION

Toledo Police Patrolman's Assoc., et al.,

v.

City of Toledo, et al.,

JOHN W. POTTER

[X] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff, David O'Brien recover of defendant, Frank Stiles the sum of \$2001.00 with interest thereon at the rate of 6.71% as provided by law, and his costs of

action; and that plaintiff, David O'Brien recover of the defendant, Ronald Navarro the sum of \$2001.00 with interest thereon at the rate of 6.71% as provided by law, and his costs of action; and

IT IS ORDERED AND ADJUDGED

that the plaintiff, Charles Nearhood recover of the defendant Frank Stiles the sum of \$2001.00 with interest thereon at the rate of 6.71% as provided by law, and his costs of action; and that plaintiff, Charles Nearhood recover of the defendant, Ronald Navarro the sum of \$2001.00 with interest thereon at the rate of 6.71% as provided by law, and his costs of action.

JOHN W. POTTER
United States District Judge

JAMES S. GALLAS
CLERK
(ILLEGIBLE)
(BY) DEPUTY CLERK

TOLEDO, OHIO

TOLEDO, OHIO

4-19-88
DATE

**MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT**

(Filed March 18, 1988)

Case No. C 86-7755

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Toledo Police Patrolman's Association, et al.,
Plaintiffs,

vs.

City of Toledo, et al.,
Defendants.

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on defendants' motion for sanctions, plaintiff's opposition, and defendants' reply. On January 27, 1988, defendants filed a motion to compel. Although plaintiffs were afforded the prescribed period of time to respond to this motion, they did not do so. Originally plaintiffs represented to this Court that they had never received a copy of defendants' motion. However, plaintiffs now realize that defendants had in fact hand delivered a copy of the motion to plaintiffs.

On February 23, 1988, the Court ordered plaintiffs to respond to defendants' outstanding interrogatories and requests for production of documents within five days.

On February 29, 1988, defendants requested reconsideration of the Court's order, and this request was denied on March 3, 1988. Thereafter, approximately fifteen days after the Court ordered plaintiffs to respond to defendants' requests, plaintiffs did file responses to defendants' interrogatories and requests for production.

Plaintiffs seem to imply that defendants had an obligation to mail the motion or telephone defendants' counsel to bring the motion to compel to plaintiffs' attention. This argument is misplaced. Defendants' discovery requests were filed in July of 1987. A party from whom discovery is sought has the burden of complying with the request, making objections or seeking a protective order. *Alexander v. Parsons*, 75 F.R.D. 536, 538 (W.D. Mich. 1977). Plaintiffs did not avail themselves of any of these options.

Although this Court realizes discovery disputes do arise, the parties in this litigation have been dilatory in responding to discovery requests, which has unduly protracted the resolution of this proceeding.¹ Federal R. Civ. P. 37(b) authorizes sanctions for failure to comply with discovery requests and orders. The Rule grants a court broad discretion in imposing sanctions. *Davis v. Marathon Oil Co.*, 528 F.2d 395, 403 (6th Cir. 1976). "Both parties and counsel may be held personally liable for expenses, 'including attorney's fees' caused by the failure to comply with discovery orders." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980).

¹ Defendants' interrogatories and requests for production were filed on July 30, 1987. On November 27, 1987, the Court vacated a trial date partially in an effort to allow the parties to obtain outstanding discovery. See Defendants' Motion to Vacate Trial Date.

Since defendants had not received the discovery that plaintiffs were ordered to provide, defendants filed a motion for sanctions on March 3, 1988. Seven days later plaintiffs filed the discovery with this Court. In the exercise of this Court's discretion and pursuant to Fed. R. Civ. P. 37(b), defendants' motion for sanctions will be granted against plaintiffs' counsel for failure to comply with the discovery orders of this Court. Therefore, within ten days from the date of this order, defendants are ordered to submit an itemized application for expenses, including reasonable attorney's fees, caused by plaintiffs' failure to comply with this Court's February 23, 1988 order.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion for sanctions be, and hereby is GRANTED.

JOHN W. POTTER
United States District Judge

ORDER OF THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT
RE MOTION TO STAY

(Filed June 27, 1990)

No. 89-3524

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOLEDO POLICE PATROLMEN'S ASSOCIATION
LOCAL 10, I.U.P.A.; CHARLES R. NEARHOOD;
DAVID M. O'BRIEN, On Behalf of themselves and all
other persons similarly situated,

Plaintiffs-Appellants,

v.

CITY OF TOLEDO; DONNA OWENS, Mayor; GENE
COOK, Vice-Mayor; CARTY FINKBEINER; LINDA
FURNEY; PETER UJVAGI; MARK
PIETRYKOWSKI; STEVEN YARBROUGH; JUDY
JONES; MAX REDDISH; C. E. RISER; PHILIP
HAWKEY, City Manager; JOHN MASON, Chief of
Police; FRANK STILES, Sergeant; RONALD
NAVARRO, Sergeant,

Defendants-Appellees.

ORDER

BEFORE: WELLFORD and BOGGS, *Circuit Judges*; and
GILMORE, *District Judge*.*

Upon consideration of the motion of the appellant to
stay issuance of the mandate pending application to the
Supreme Court for writ of certiorari,

* The Honorable Horace W. Gilmore, United States District Judge
for the Eastern District of Michigan, sitting by designation.

A41

It is ORDERED that the motion be and hereby is GRANTED, provided that application for certiorari be effected no later than July 25, 1990. Issuance of the mandate shall then be stayed pending a ruling by the Supreme Court. Denial of certiorari shall result in immediate issuance of the mandate.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

ORDER OF THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

(Filed August 6, 1990)

No. 89-3524

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOLEDO POLICE PATROLMEN'S ASSOCIATION
LOCAL 10, I.U.P.A.; CHARLES R. NEARHOOD;
DAVID M. O'BRIEN, On Behalf of themselves and all
other persons similarly situated,

Plaintiffs-Appellants,

v.

CITY OF TOLEDO; DONNA OWENS, Mayor; GENE
COOK, Vice-Mayor; CARTY FINKBEINER; LINDA
FURNEY; PETER UJVAGI; MARK
PIETRYKOWSKI; STEVE YARBROUGH; JUDY
JONES; MAX REDDISH; C. E. RISER; PHILIP
HAWKEY, City Manager; JOHN MASON, Chief of
Police; FRANK STILES, Sergeant; RONALD
NAVARRO, Sergeant,

Defendants-Appellees.

ORDER

BEFORE: WELLFORD and BOGGS, *Circuit Judges*;
GILMORE,

*District Judge.**

Upon consideration of the appellant's motion for an
extended stay of mandate until 8/24/90,

* The Honorable Horace W. Gilmore, U.S. District Judge for the
Eastern District of Michigan, sitting by designation.

A43

It is ORDERED that the motion be, and it hereby is, GRANTED. Issuance of the mandate will be stayed until 8/24/90.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

UNITED STATES CONSTITUTION**Amendment IV—Searches and Seizures**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. §1983

42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.

28 U.S.C. §1343

28 U.S.C. §1343 Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, §121, 71 Stat. 637.

28 U.S.C. §2201

28 U.S.C. §2201 Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, §12(p), 72 Stat. 349; Oct. 4, 1976, Pub. L. 94-455, Title XIII, §1306(b)(8), 90 Stat. 1719; Nov. 6, 1978, Pub.L. 95-598, Title II, §249, 92 Stat. 2672.)

OHIO REVISED CODE

§2905.03 Unlawful restraint.

(A) No person, without privilege to do so, shall knowingly restrain another of his liberty.

(B) Whoever violates this section is guilty of unlawful restraint, a misdemeanor of the third degree.

HISTORY: 134 v H 511. Eff 1-1-74.

[254] EXCERPTS OF TRIAL TRANSCRIPT
MARCH 30, 1988

* * *

Thereupon, the Plaintiff called as a witness, JOHN MASON by way of deposition:

CROSS-EXAMINATION

BY MR. ZOLL:

Q. Could you state your name for the record, please?

A. John Mason.

Q. John T. Mason?

A. John W.

Q. And Mr. Mason, if you would turn to page 106 of your deposition, I will read the questions that I asked you back in July of 1987 and if you would read then the answers. Starting on line 17.

Would the limits of authority include the authority to bring someone downtown for questioning who did not want to come downtown?

A. Would the limits of their authority—

Q. Would they been permitted to do that?

A. —include bringing someone downtown who did not want to come downtown?

Q. Yes.

A. Nonpolice officers?

Q. Yes.

A. Not unless they placed them in custody. I would think if they were at a location where they had an individual that they [255] wanted to talk to downtown and that individual refused to come downtown, they would not have the authority to bring in a nonpolice private citizen person downtown without putting them into custody.

Q. Would they have authority to put them in custody?

A. Yes.

Q. What's involved in that answer?

A. Placing them under arrest, apprising them that they're under arrest. If they didn't want to come voluntarily and if they had sufficient evidence or information, probable cause to make an arrest, they could place that person in custody and bring them downtown.

Q. Again, I'm not a criminal lawyer. Excuse me. But do you have a have a warrant to do that?

A. No, sir.

Q. You can just do it just generally, make an arrest for purposes of questioning or would they have to be a suspect?

A. They would have to be—again, you would have to have probable cause to make the arrest which in my mind means that you would have to have reasonable information upon which to base the probable cause.

Q. Probable cause of a crime?

A. That this person committed a crime.

Q. I see. Now, what about with regard to a police officer now that—

[256] A. My opinion is that—

Q. —is not on duty?

A. My opinion is that there's a different standard with regard to that question and that issue.

Q. And what is that?

A. That a police officer—that the police division, the chief of police and/or his designee in this particular case, the two sergeants, have the authority to require to police officer to respond to questions regarding an investigation that is taking place, bringing them downtown in order to accomplish that at a point in time that those officers

would be deemed to be suspects in that case. And they would have their constitutional rights read to them and would be afforded their constitutional against self-incrimination.

My understanding is that that is not what happened on the night in question.

Q. I want to get your understanding of what happened on the night in question, but first I want to be sure I understand what you just told us. It's your position that someone—that a police officer who is not on duty can be required to come downtown for the questioning irrespective of whether or not they're a suspect?

A. That's correct.

Q. And against their will?

A. Correct.

[257] Q. Would the command officers have the authority to require an officer to come downtown in a police vehicle instead of their own vehicle?

A. If they felt that was appropriate, yes.

Q. Without placing them in custody?

A. Correct.

Q. So they could require them to come downtown in a police vehicle without placing them in custody?

A. Correct; yes.

Q. And they would also have the authority to refuse to let them come down in their own transportation vehicle?

A. If they felt that was appropriate, yes.

Q. And then you started to talk about reading them their rights. Are you telling me at some later time they would be?

A. If there were found—

Q. If they?

A. Yes, It's a typo.

Q. Yeah.

A. Shall I read it as they?

Q. They, yes.

A. If they were found to be a suspect or if they were focused upon as a suspect as a result of that interview or interrogation, then they should properly be read their constitutional rights against self-incrimination.

Q. What is the source of that authority, that authority to require [258] an off-duty police officer to come downtown for questioning against his will?

A. What is the source of it?

Q. Yes, sir.

A. I'm not sure that I can point to a direct section of the division manual. I think it is inherent in the responsibility of the law enforcement organization and their rights to conduct the business of that association that they have—the administration has the authority to compel a police officer to report to the station house, answer questions, submit to an interview or interrogation with regards to his performance of duty.

MR. ZOLL: Thank you.

THE COURT: Is that all?

MR. ZOLL: That's all Your Honor.

THE COURT: Thank you.

**EXCERPT FROM COLLECTIVE BARGAINING
AGREEMENT BETWEEN THE CITY OF
TOLEDO AND TOLEDO POLICE
PATROLMAN'S ASSOCIATION, I.U.P.A.
JANUARY 1, 1985—JANUARY 1, 1988.**

The City of Toledo has entered into this Agreement with the Toledo Police Patrolman's Association, Local 10, which has as its purpose the promotion of harmonious relations between the City and the Police Personnel in the classifications herein; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of rate of pay, hours for work, and terms and other conditions of employment.

The provisions of this Agreement have been negotiated in ordinance form and have enacted into ordinance by the Council of the City as Chapter 2129 of the Toledo Municipal Code.

2129.01 Recognition of the Toledo Police Patrolman's Association, Local 10, I.U.P.A.-A.F.L.-C.I.O.

The City agrees to recognize the Toledo Police Patrolman's Association, Local 10, (hereinafter referred to as the Association), as having jurisdiction over and being the sole and exclusive bargaining agent for employees of the City working in the classifications that are listed in Section 2129.02 herein for the purpose of establishing wages, hours of work other terms and conditions of employment, and handling of grievances. The City shall not negotiate with, nor make any collective bargaining agreement or contract with any other employee group or with any of the employees working in classifications covered by this agreement,

individually or collectively. All agreements entered into between the City and the employees covered by this agreement shall be through duly authorized representatives of the Association. Any other agreement shall be of no effect.

2129.19 Employee's Bill of Rights

A. An employee has the right to the presence of counsel and/or a representative of his recognized bargaining unit and the right of cross-examination of all witnesses at disciplinary hearings requested before the Chief of Police, the Safety Director, Civil Service Commission and/or before an Arbitrator.

B. An employee who is to be questioned as a suspect in any investigation of any criminal charge against him shall be advised of his Constitutional Rights before any questioning starts.

C. Before an employee may be charged with any violation of the Divisional Rules and Regulations for a refusal to answer questions or participate in an investigation, he shall be advised that his refusal to answer questions, or participate in such investigation, may be made the basis of such a charge.

D. Any interrogation, questioning or interview shall be conducted at a reasonable hour, preferably while the employee is working. Interrogation sessions shall be for reasonable periods of time, and time shall be allowed during the questioning for rest periods or for other physical necessities.

E. The employee shall be informed of the nature of the investigation prior to any questioning.

F. When a single anonymous complaint is made against an employee and there is no corroborative evidence of any kind, the employee accused shall not be required to submit to interrogation or make a report.

G. There shall be no press release by the City or the Association regarding the employee under investigation until the investigation is completed and the employee is either cleared or charged.

H. When an employee suspected of a violation is being interrogated in an Internal Affairs investigation, such interrogation shall be recorded at the request of either party.

I. An employee who has been charged with a violation of any Divisional policies, or Rules and Regulations, shall upon request be provided the opportunity to inspect and obtain written statements and any other material as a condition to its use at a hearing on such charge. Such request must be made forty-eight (48) hours prior to the scheduled hearing time. However, the forty-eight (48) hour provision may be waived in the event of extenuating circumstances.

J. No hearing that may result in the dismissal, demotion, suspension or reprimand shall be held unless the employee is notified of the hearing and the reasons for it at least seven (7) calendar days prior thereto.

K. Any evidence obtained in the course of an Internal Affairs investigation through the use of administrative pressures, threats or promises made to the employee shall not be used in any subsequent criminal court action.

L. In the course of an Internal Affairs investigation, a polygraph examination will be administered only with the consent of the officer under investigation. If in the course of an internal investigation, an employee has been given a polygraph examination, such examination shall not be used in any subsequent criminal court action.

M. When an employee is to be interviewed in an investigation of any other member of the Police Division, such interview shall be conducted in accordance with the procedure established herein.

N. Any Officer brought before the Internal Affairs Unit for investigation has the right upon request to have present an attorney. Any information divulged at said interview shall remain confidential.

O. If the rights of the employee who is under investigation as provided herein have been violated, the violation shall be subject to the grievance procedure, but limited to the Fourth Step of such procedure.

P. Investigations by Internal Affairs with regard to minor violations shall be completed within forty-five (45) calendar days after filing of the original Departmental Investigation Form (D.I.F.).

Major complaint investigations, other than criminal complaints involving felony violations, shall be completed within one hundred (100) calendar days after filing of the original D.I.F. unless upon request to the Safety Director an extension of time for such investigation to be completed is granted. The Association must be notified of the Safety Director's decision upon the granting of an extension request.

Criminal complaints involving felony investigations shall be investigated and completed in accordance with the statute of limitations set out in the Ohio Revised Code.

An additional fifteen (15) calendar days shall be provided beyond the forty-five (45) and one hundred (100) day limits above in cases where the investigation is not initiated in the Internal Affairs Section although a D.I.F. has been filed.

[116] EXCERPTS OF TRIAL TRANSCRIPT
MARCH 30, 1988

[CHARLES NEARHOOD TESTIMONY]

A. No. Basically, we were—that was the first time we had worked on that sector which is sector 7, and we were just getting to know the streets. They call it the cut because you try to get the block cuts between each street, so we started with the outside streets and just try to work our way through. We try and familiarize ourself with the beat itself.

Q. Who was your partner anyway that day?

A. David O'Brien.

Q. All right. So on September 20th, I assume that's what you told Officer—or Sergeant Navarro?

A. Yes. And we went over the case that Sergeant Navarro had. He had the dispatch cards. They tell the activities. If you have been given a call or if you have a traffic stop, they tell the activity, and we had gone over those cards.

* * * * *

[118] Q. Then was there any other, other than up to the time of your day off, the 24th incident, where were you asked questions about this—

A. No. Those were the two incidents.

Q. Okay. All right. Now, I take it that September 24, 1986 was your day off?

A. Yes, it was.

Q. What shift were you working at that time?

A. It's called the 8:00 to 4:00 shift. It's 8:00 p.m. to 4:00 o'clock a.m. in the morning.

Q. And you have been on that shift for some time I take it?

A. No. That was—well, on the 24th we had been on it for 2 days because we started on the 1st of September on that shift.

Q. Okay. Do you recall anything—was it an ordinary day or at the beginning of the day?

A. Pretty much. It was a fairly nice day and we were planning on going out to eat and just in my boys' bedroom playing with them, you know how you wrestle with them and they jump on your back and things like that, and it was basically what I was doing was just wrestling around with them.

[119] Q. Then what happened?

A. Then I heard a knock on the door. I went to the front door and I said—I saw the red car out in the driveway because I always check out the window and opened the door and it was Sergeant Stiles and Sergeant Navarro standing on the porch.

And I opened the door and I said, what's going on, and they said we need to talk to you. And I said is this in regards to City Park, and he said yes. And I said, well, come on in because it's going to take me a while to get dressed.

And they came in the house for a second, and I says, well, I can meet you down there. I said, I'll drive down myself. There will be no problem because it's going to take me a while to get dressed, and they said, no, you need to get dressed right now and we'll drive you down.

Q. Did they express any interest in having you come down immediately?

A. Yes. They said we want you to get dressed now and you don't need to take a shower, all that stuff. Just get dressed and come on down.

Q. Did they offer to question you there in your home?

A. No, they didn't.

Q. How about outside or in the car?

A. No. They didn't want to talk at the house or out in the car. They just wanted us to go down—they wanted me to go down at that time.

* * * * *

[123] Q. What happened when you arrived downtown—for the jury, when we say downtown, that means the Safety Building?

A. Yes. The police station is the Safety Building.

Q. And that's right over here on Erie Street?

A. 525 North Erie.

Q. Why don't you tell us then in your own words what happened when you got to the police station?

A. Well, we drove—it's called the barn but it's a garage that's right next to the police station. It's attached to the police station. When you're dropping off prisoners or equipment or evidence, you drive into the barn, and we drove into the barn which is the garage and parked our car and started walking towards the door going into the police station.

Q. Did you see anybody in the barn?

A. I saw Harry Marquis. He's a police officer works on afternoons in the wagon.

Q. Did you say anything to Harry?

A. I told Harry, I said, they're bringing us from our—they brought us down from our house, I need to talk to a union steward or somebody. And Harry said it just so happens my partner is a [124] union steward, and I saw Anne Smith there.

I told Anne, I said, Anne, they just took us from our house and brought us down here, and she says I'll be right with you, I got to make some phone calls and I'll meet you up on the fourth floor.

Q. And they took you to the third floor?

A. As we were walking up the stairs, I had to lag behind talking to Anne Smith, and Sergeant Navarro says, come on, let's get in the elevator, this looks bad enough, and so I followed what he said and I went in the elevator and went up to the third floor.

Q. Now, what part of the third floor do you go to when you get up there?

A. There are seats right outside of the detective bureau. We just— they are hard back seats and you just sit. We sat there for a few minutes and then they took Dave immediately into the office, the homicide office, and they closed the door. I, again, didn't see where he went from there.

* * * * *

[125] Q. That's hearsay. But as far as any discussions, did you have any discussions at this point before you were interrogated with Mike Collins?

A. Yes. Anne Smith had talked to Mike on the telephone and had gotten a hold of him on the telephone up there at the detective bureau, and I said—I asked Mike, I said what's going on, I said, they took us from our house and they brought us down here and what are we supposed to do? I was pretty scared at the time.

Q. You can't tell us what Mike said to you, but what action did you take as a result of what, if any, statement he might have said to you?

A. Basically, just when I had gotten into my interview, I had asked for my Miranda Rights or a union representative—

Q. Okay.

A. —because—

Q. Is that about the next thing that happened then?

A. I was taken down to the homicide office and then they took [126] us into a—it's an interrogation room. It doubles as a holding cell for prisoners because the only time I had taken anybody out of there was a guy that was wanted on a warrant for felonious assault, and he was in that holding cell, so we went into that office and had a table and three chairs I believe.

Q. Are there any windows in this room?

A. Just the windows on the door. The doors got wire mesh on the window and that's the only window.

Q. Is this just a normal door for this room?

A. No. It's a steel door with a slide bolt lock which you took the prisoners in the room.

Q. Who was in the room with you?

A. Sergeant Navarro and Sergeant Stiles.

Q. And I take it that they questioned you and put it on tape?

A. Yes. They—Sergeant Stiles said that they were going to tape the interview, and he tested the tape and started the tape, and then I asked—he said—I said, are you going to give me either my Miranda Rights or can I talk to a union representative?

And he said, well, who's your union representative. And I said Mike Collins is on his way in.

He says, well, how long is he going to be? I said, well, I called him while Dave was in there and he said he would be here in thirty minutes and it's almost thirty minutes ago and he should be here real short. And he said you have two to three minutes and we're starting the interrogation.

[127] Q. And I take it Mr. Collins didn't get there in time and they started the interrogation?

A. Yes. Well, Sergeant Navarro left the room then because we stopped the tape, and I stood up and walked around a little bit and Sergeant Navarro came back into the room and he said, I talked to the chief on the phone and you don't have a right to union representative. This is a criminal investigation so we're going to go ahead with it. Sergeant said, okay, we're going ahead with the interview.

Q. All right. Did you tell them anything different at that interview from what you'd already said in your written report and your prior statement to Sergeant Navarro?

A. We went over the same dispatch cards basically except for there was—they talked about a picture with Ed White. They asked me about Ed White, and then Sergeant Navarro hadn't spoke anything about what happened with the lie detector test prior to that, but evidently two people—they claimed two people had taken polygraph tests or lie detector tests prior to us and they had witnesses to the occurrence.

And then they—we talked about the cards a little bit and then Sergeant Stiles started getting serious and he said—he looked at me and he said, you know there's a difference between neglect of duty and felonious assault or murder because charges are a lot less.

And I started to get really upset there because I was scared [128] and I really felt like these guys were going to charge us with murder or if not murder, neglect of duty which would have—we would have been fired then, and they were looking for some type of charge along those lines either that we had did this to this guy, and if we didn't do this to this guy, we saw this guy and saw him hurt and we went along and just let him lay there.

And I said no. I said, if you want the answer to your question, I said, I have never seen this man. I said, if he would have been involved in a criminal activity, I would have either arrested him or helped him and he would have been in the hospital when I saw him, and I was very upset about that. I didn't—I never saw that gentleman or he would have been helped.

Q. Will you tell the jury, I guess there came a time when you made it home?

A. Yes.

Q. And I guess this upset you a little bit?

A. I was scared anytime you look at what could have happened to you as a police officer.

* * * * *

[261] [DAVID O'BRIEN TESTIMONY]

A. I believe there was a statement given September 20th to Sergeant Navarro up in the homicide squad. I believe it was September 22nd that we did another one for internal affairs.

Q. And was the second one—the second statement that you gave, was that a handwritten statement?

A. Yes, it was.

Q. And how did the interview take place on September 20th with Sergeant Navarro?

A. My partner, who was Chuck Nearhood at the time that I recall, were called in while we were on duty and we went to his office. We were seated at his desk. Both Chuck and I were present. He asked us to go over our activities in the night, and we did that.

Q. Okay. Okay. Now, what do you recall that you did on the morning or afternoon of September 24, 1986?

A. It was—I went and I played tennis with one of my friends.

Q. Is he also a police officer?

A. Yes, he is.

Q. And what happened after you played tennis?

A. I came home and I started to take a bath. I was in the bathtub when there was a knock at the door.

Q. And will you tell us what happened?

A. Sure. I yelled down first, since I wasn't dressed, to find out who it was. There was no answer. I went to the edge of the [262] stairway, yelled down again but again there was no answer, so I wrapped myself in a towel.

I went down, peeked around the corner, saw there was someone standing there and I asked, you know, I asked who it was. He said he was Sergeant Stiles and he needed to speak to me. I told him to come in.

When he came in, my dog started jumping on him, so I took my dog and I left him in the back.

He told me that I had to come downtown right then, and I asked him, well, does this involve something at City Park, he goes, yes, it does. I told him that I was in the middle of taking a bath at the time. He said you have to go upstairs, get dressed and come with us now.

I said my wife isn't home and I have no way of getting a hold of her. He goes, you have to go upstairs and get dressed and you come with us now. I asked him if he would have a seat while I was doing this. He told me no. He told me your partner Chuck Nearhood is already in the car. We will be sitting outside waiting for you there.

Q. What did you do then?

A. I went upstairs. I tried to get a hold of my wife. We have a phone upstairs. I tried to call her to advise her that I was in some sort of trouble. I couldn't get a hold of her. I went in the bathroom. I rinsed myself off and I started to get dressed.

[263] My wife finally did—I called a couple places. I think I called her where she works. I called a couple friends but I couldn't get hold of her. Finally, she called, and I just told her, I said they're here, they're taking me downtown, I don't know why and I don't know when I'll be back, and she tried to talk to me further but, you know, it sounded very important that I go outside right then so I hurried up and got dressed and went out to the car.

Q. Okay. Where did you go then in the car?

A. They took us down to the Safety Building police station.

Q. And what happened when you said got to the station?

A. Well, we got to the station, we got out of the car. We were directed to the elevator and taken upstairs to the third floor of the Safety Building.

Q. Do you know who was questioned first?

A. Yes. I was questioned first.

Q. Tell us where they took you and what was done?

A. They told to sit in the hall. We sat down just for a minute or so and they called for me to go back. I went back into the homicide room—into the interrogation room.

Q. Describe that room for us?

A. It's a very small room. It has a metal door on it with a glass window. It had a table and chairs in there.

Q. Are there any windows other than the window in the door?

A. No.

[264] Q. Are there any decorations on the wall?

A. NO, no decorations. It's an interrogation room.

Q. All right. Who was in the room?

A. It was myself, Sergeant Stiles, and Sergeant Navarro.

Q. And what took place?

A. Well, they started off, they told me that right now this involves a felonious assault of a man. It's very serious. He's still in the hospital. He may die so this may turn into a homicide investigation and that he said that if I was holding anything back and if I had not told everything on the earlier investigation, that I was to come out with it right now.

Q. Was—at some point in time did they turn on a tape recorder?

A. Yes, they did. I believe it was after that.

Q. And did you attempt to cooperate with them?

A. Yes, I did. I tried to be as cooperative as possible. I didn't want—I wanted to act like I have been telling the truth like I had been previously.

Q. Did you make an effort to do so?

A. Yes, I did. I was told that if I was ever interrogated on anything try to keep very still and calm. Look them directly in the eyes and talk very calm and softly, that way you don't give an overpowering or—that they don't think you're lying at all.

Q. And obviously I mean, you were telling the truth?

A. Yes, I was telling the truth.

[265] Q. And is that the demeanor that you took with the interrogators?

A. Yes, I did.

Q. Do you know about how long you were in that room with them?

A. Rough guesstimate would be thirty minutes to forty-five minutes.

Q. Did you have your weapon with you?

A. No, I didn't.

Q. Did you feel free to leave at this point?

A. No, I did not.

Q. Did you feel free to leave when you were at home?

A. No, I did not.

Q. Now, what happened after the interrogation stopped?

A. After the interrogation stopped, they took me out, they told me to have a seat in the hallway and I went out in the hallway.

It had built up—I had been very upset at this time. There were a couple people out there trying to help me just to settle down, and I sat there for maybe a minute or so. I started—I was getting upset. I said that I need to take off, and very shortly after that, I was taken by someone else into another room.

Q. And this other room that you were taken, can you describe that room for us?

A. It was just another small room like the one previous.

[266] Q. And was that in what's called the personal assault unit?

A. Yes, I believe that's where that was at.

Q. Was there anybody in that room with you?

A. No, they took me. There's a larger room and then there's a smaller room. They took me in the smaller room. I asked why am I being taken back here now. There was no response to why I asked that and they shut the door.

Q. They shut the door?

A. Yeah. The door was shut.

Q. How long were you held in that room?

A. I couldn't say. It seemed like a long time. It felt like forty-five minutes or so. He did come and check on me once in between that, and I said, what's—how long am I going to be here. He said it may be a while. Your partner's giving me trouble.

Q. Now, there came a time, I take it, when you made it home?

A. Yes, I did.

Q. Do you remember about what time you got home?

A. It was between 10:30 and 11:00.

Q. Will you tell the jury what, if any, problems, concerns this interview, this interrogation had on you, caused you?

A. I was very upset at the time. My wife and one of her friends was home at the time. They asked my why they took me down. I had no good explanation. I said it's just that they took me down. We did have some beer there so I started drinking.

[267] Q. Did you have any problem for the next few days personally?

A. Yeah. I was very upset. The next day—I had the next day off. So you know, me and my wife we just talked mainly. That's all we could do really. I went back to work. They started harassing me. As soon as I sat down to roll call, somebody took my night stick and they started passing it around. And they'd say, wouldn't they like to get a hold of this as evidence. I said, come on guys, give me my night stick back. I didn't think it was very funny at the time.

Q. Now, at the time you were picked up at home, was any intent expressed by Sergeant Stiles as to what his intent was?

A. He was just very authoritative, very short on words. It was just—you know, he didn't want to answer any questions there. He said, we have to take you downtown now.

Q. And did he carry out that intent?

A. Yes, he did.

Q. Did you understand that that was a requirement?

A. As to my understanding, it was more like you're coming with us. It was no objecting, that's the way it is.

Q. Did you feel free to leave at any time?

A. No, I did not.

Q. Now, as they were taking you downtown from your home, what was the demeanor like of Sergeant Stiles and Navarro?

A. It was very quiet. The first thing I said was, I said someone's wife is going to be very mad at them because my wife

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[296] [RONALD NAVARRO TESTIMONY]

By Mr. Merritt:

Q. Sergeant, state your full name for the record, please?

A. I'm Sergeant Ronald Navarro.

* * * * *

Q. How long have you been employed with the Police Department?

A. Fifteen years today.

Q. Now, Officer, did there come a time when you became aware of an incident which had occurred in the area of a park in the City of Toledo known as City Park; did there come a time when you became aware of an incident that occurred in September of 1985?

A. Yes, sir. On September 15th, I believe it was. Chief Vetter came to the homicide office and assigned the felonious assault investigation to me.

[297] Q. Was anyone else—anyone else been involved to that point to your knowledge?

A. Yes. It had been investigated by Detective Doug Wilbur of the personal assault unit. The reason it was assigned to him, it was—in the original crime report, it was indicated that it was a rape. The personal assault unit handles rape cases.

Q. All right. And gradually you became involved with the investigation, did you not?

A. Yes, sir. On the 15th I got the investigation.

Q. All right. Now, what was the—basically, Officer, what was your approach to the investigation?

A. Well, I got the investigation late on the 15th. It was—I get off work at 3:00 o'clock. They gave it to me about 2:30. I didn't do anything that day with it.

The next morning, I reviewed the supplemental investigation by Detective Wilbur, tried to get a feel for the case. I re-interviewed everybody in that investigation that he had already interviewed to make myself more familiar with the case.

Q. And what about the victim, did you have any occasion to talk to the victim?

A. On the 15th—well, prior to the 15th—well, indicated in Detective Wilbur's report, it was indicated that the victim was comatose, he was on the ventilator, couldn't breathe, couldn't talk and he was on the machine. I was unable to talk to him that day.

[298] The next day or the day that I was assigned, I didn't talk to anybody.

On the 16th, I went to the hospital, viewed him. He was still unconscious. I went to the mother's home to talk to her to get a feel for some of the friends that he might have, somebody that may have had it in for him, may have wanted to assault him.

Q. On the occasion that you went to the hospital, Officer, did you develop any possible leads at that time as to who may have perpetrated this?

A. The first day, I had talked to emergency room personnel about the investigation. I don't remember their names. I would have to go through my supplemental report. One of nurses had indicated that he had said that he was hurt by two brothers, and I think they indicated that they stuck a bat up his rectum.

Q. All right. What did you do next in the course of investigating this matter?

A. Well, I continued on interviewing different people involved. I went out and interviewed a man by the name of Lloyd Carlson who was supposed to have been a close friend of Robert Wright, 26 year-old black male that was feloniously assaulted in City Park. You know, I talked to him at length trying to determine if there was anybody that he knew that had it in for Robert, where his activities were, you know, what he did.

In the interview, Mr. Carlson had indicated that Robert drank a lot. He hung around a lot in—I think it was in the

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[300] Q. Would you consider that a normal course of investigation?

A. Yes, sir.

Q. Now, did there come a time, Sergeant, when you became aware of a witness by the name of Ed White?

A. On the 15th when I was assigned the investigation, it was indicated to me that they had a—I think he's 53 years, black male had been a witness to the assault. His allegations were that a van had pulled up—was pulled along the curb. A Toledo police wagon was pulled up along the curb. He had gone around a corner. He had pulled under—alongside or near the police van.

One of the officers came out from underneath two trees near the pool and said to him: What's your business, move along, and at that, he said he left, but going back when he said when it was brought—first brought to his attention he was at the corner of, I think it's Elizabeth and Vance stopped at a stop sign. He looked over towards the side of the pool, saw the Toledo police van parked along the curb, looked a little closer. He said it looked like two Toledo police officers. The police officers were using their night sticks to hit this black male.

He said to further clear up in his mind, he went around the corner. When he went around the corner, one of the officers came out from underneath the trees and said to him, something to the effect, what's your business, if you don't have any business here, leave.

Well, Ed White said that the reason he left was that he had [301] a gun in the truck and—

Q. All right. Sergeant, did you—how many times altogether did you interview Ed White, do you recall?

A. Twice.

Q. And do you remember—I'm sorry. What was the date of the first interview?

A. I would have to get my supplemental. It was early on in the investigation. I wanted to get a better feel for what kind of man this was that would make a statement about police officers, and I got another report from him.

Doug Wilbur had also interviewed him. I interviewed him again, and then on the 23rd, I re-interviewed him again due to information that I had about him and how he learned about the incident.

Q. All right. So this is the second time that you yourself have now interviewed this alleged witness?

A. Yes, sir.

Q. And how did—do you recall how he—first of all, where did you interview him, Sergeant?

A. I interviewed him in the homicide office.

Q. And this was—explain for the jury where this is, where your office is, please?

A. The homicide office—Detective Bureau is on the third floor. I work in the investigative services section at that time. The homicide office is on the third floor. As you get off [302] the elevator, it's to the right at the end of the hall. It's where my desk is. It's where my name plate is. It's where I type all my reports. I interview—

Q. I'm sorry, Sergeant. Was there anything unusual about the fact that being in that section you would have been assigned to this particular case, is there anything significant about that at all or is that just—

A. Why I got the investigation?

Q. Yes.

A. Well, it was because Ed White had made the allegation that Toledo police officers had beat this man.

I, being a sergeant and superior to a patrolman on the street, they are assigned those investigations. It's impossible for a detective to be able to interview a police officer being that they are the same rank. You can't order them or tell them to do things that you wouldn't want answered.

Q. And on the second occasion, I think you said it was September 23rd of 1986, do you recall, was Mr. White interviewed again in the homicide section at our desk?

A. Yes, sir. It was about—I think it was 10:00 o'clock at night. I had—I believe I had a hard time getting a hold of him. Finally got a hold of him and I said, "I'm going to come out and pick you up, okay?" He said, "All right, no problem."

So I went out to his place of business at 758 Tecumseh I think it was. He owned a bake shop.

[303] Q. Did you explain to him why you wanted him to come back down to the Safety Building?

A. Yeah. I said I wanted to re-interview him. I also wanted him to look at a photo array of police officers of all the wagon crews that worked that night in the City of Toledo. I had a—I had to clear up the names of the police or the allegations that a police officer was involved.

Q. And at that point, Sergeant, would you state whether or not you had any question as to the veracity of the information that you had received; were there any inconsistencies in Mr. White's information that you were aware of?

A. Yes, there was. Mr. White in his first report and interview to me, said that he had come on this incident on his own. He was just on his way home. He saw it happen.

Well, we—somewhere or other, there was another witness. His name was Johnny Ringo. He had indicated that he had told Ed White about what he had seen in the park and that's why Ed White went over there.

Q. Now, when had you come across this second witness, Mr. Ringo or Johnson?

A. He was located on the 23rd. Apparently prior to the investigation, I think it was Lieutenant Kaperski and Dan Shultz had gone into an after-hours place canvassing information. During that time they know people and know how to get information. They found out that Johnny Ringo was there and he was the one that [304] gave the information that—to Ed White, and then the reason Ed White went down to City Park was because of his curiosity that was built up by Mr. Johnson.

Q. So you perceived inconsistencies in Mr. White's statement to you?

A. Oh, yes.

Q. And you telephoned him and indicated that you would like to bring him down to the Safety Building?

A. Yes.

Q. To look at a photo array, is that correct?

A. Yes, that, too.

Q. Now, he was a witness at this time, was he not?

A. Yes.

Q. He was not a suspect, was he?

A. No.

Q. And did you, in fact, show him a photo array of all of the wagon crews who had been working that evening?

A. Yes, I did.

Q. And did he pick any of the photographs?

A. Yes, he did. He picked Officer Michael Babcock and Officer Thomas Luetta's photos.

Q. All right. Specifically, he did not pick either Officer Nearhood or Officer O'Brien's photos?

A. No. I specifically asked him to look over again to make sure that he wasn't making a mistake. He looked through it [305] again. In fact, he probably looked through it a third time to make sure, and he says it looks like Officer Babcock—he didn't know their names but he gave me—I had them numbered and it was Officer Michael Babcock and Officer Tom Luetta's photos that he picked on the 23rd.

Q. And Sergeant, did he ever indicate any particular license plate for any van when he had given you these versions of what he thought he had seen or what he had heard?

A. No.

Q. Did he ever give any particular markings that would identify a specific van?

A. He said it looked like a Toledo police van. We—or I asked him if he saw a number on the van, any type of number that would give me any type of—more information to be able to locate his allegation of these police officers being involved in this. He couldn't remember.

Q. And Sergeant, so you then showed him a photo array of the crews, all of the crews that were working?

A. Yes, I did.

Q. Now, what occurred next in the course of your investigation with—incidentally, was this new information, this second witness, Johnny Ringo?

A. Yes. It was information brought up by the vice people, Lieutenant Kaperski and Dan Shultz.

Q. And what effect, if any, did that new information have on [306] your investigation in terms of what you did next?

A. Well, we went over to make contact with Johnny Ringo. It was probably 11:30 at night. We had a hard time finding him. We talked to him and asked him to come down. He was reluctant. He didn't want to, then he changed his mind. He said that he would come down, brought him down to the homicide office, interviewed him—

Q. Excuse me, Sergeant. Did most of your interviews that weren't done in the field were they done in your office in homicide bureau?

A. Yes; yes, at my desk. That's where my telephone is. That's where my typewriter is.

Q. And you had, in fact, talked to both Officer Nearhood what, on the 20th of September at the same location, huh?

A. Yes. I believe it was the 21st. We may have been off the 20th. I don't remember. I know I called in two crews, one of them being Leo Eggert and I can't remember his first name, Officer Miller. Neil Miller I think it was.

Q. This was on the 21st was it?

A. On the 20th.

Q. On the 20th?

A. And I also asked to talk to Chuck Nearhood and Dave O'Brien. They said that they were on days off and I had to wait until the next night to talk to them.

Q. So you talked to them again on the 21st?

[307] A. Right. That's the first time that I talked to him.

Q. And so, in other words, you were interviewing more than just the wagon crew of Nearhood and O'Brien at this point, aren't you?

A. Right. The reason that was is that they were having reviewed some of the dispatch cards and people that were in the area trying to find out who may have had contact with possibly our witness Ed White, that may have been misconstrued what he saw. Leo Eggert and Neil Miller had stopped I believe a car for driving while intoxicated at City Park and Tecumseh which is just a block away, thought that maybe in talking to them maybe they might have had a confrontation with possibly our witness or even the victim.

They had indicated that, no, that they had made an arrest, I think. I don't know if it was DWI or he was wanted on warrants. They made the arrest. They took him in and they were out of the area from probably 2:30 until—it was quite a long time. It would have taken them out of that area.

Q. Well, Sergeant, why did you feel that either the crew of Nearhood and O'Brien, or Eggert—and who did you say it was?

A. Neil Miller.

Q. And Miller—why did you feel it necessary to ask them questions on those occasions?

A. Because they were in the area of City Park. They had made an arrest in the area.

[308] Q. Is that both crews were in the area?

A. Well, yes, the wagon crews were in that area. In reviewing Detective Wilbur's report, he had gone over to the dispatcher's office and listened to the tapes and gave that information to me and the locations of where the crews were in that area at that time.

Q. All right. And again, the purpose of going over the dispatch cards with the crews in question?

A. To determine their positions and where they had gone on calls, their proximity to City Park, possibly just driving by or maybe having seen something in the area, maybe seeing another van in the area, you know.

Q. All right.

A. Just trying to get general information.

Q. All right. With the advent of the information that Mr. Ringo or Johnson brought forward, did your investigation take a different turn at that time?

A. He had said that from a different position from where Ed White had indicated. Ed White had indicated that he saw the beating occur along the Vance Street side of City Park. Johnny Ringo or Johnny Johnson had indicated that he had just left his house to go to an after-hours place and have a couple drinks.

On his way, he said he saw this man—no, he said he saw a van in a parking lot which is along the Elizabeth Street side of City Park—

[309] Q. Excuse me. Did he have any more specific information about a van at that time?

A. No. He had presumed that it was a police van. He had indicated that he didn't see any Toledo police marking on it, that it was light colored and had bubbles on the back. He called them Mickey Mouse ears which would probably resemble alley lights on the back of a wagon.

Q. All right. Did you at some point determine to re-interview wagon crews as a result of this new information?

A. Yes. We—after giving the information and telling my superiors, it was indicated that we will have to talk to all the wagon crews about this new information that we have. Now, we have another wagon in another location in that park than the first location where it was originally seen by Ed White.

Q. And you say all wagon crews, how many crews were there, do you know?

A. I don't know. They are—Frank got together all that information on what wagon crews worked that night. But tan? I don't know.

Q. And were all of them to be interviewed, Sergeant?

A. Yes.

Q. And was there a sense of needing to do this right away?

A. Yes. Due to the new information and the problems that the police department was having with the news media and different organizations, it was immediate that we get this information out [310]—get this information cleared out as fast as we could.

Q. Did you have any suspects at this particular time, Sergeant?

A. No, I didn't—well, in the original crime report, Mr. Wright indicated to Emma Jean Adams in her home when she—she's the original person that found him. He told her that four kids had taken his clothes and beat him up. His reply to him was, "You're lying. You're lying. What really happened to you?" He said, "I'm telling you four kids beat me up." And she called the police. They took him to the hospital.

Q. So as you're undertaking to interview all of the wagon crews or at least those that were assigned to you, you had this information at hand at the time, didn't you?

A. Yes.

Q. And how was the matter of interviewing all of the wagon crews divided up; were others besides you involved in this endeavor, Sergeant?

A. Sergeant Burpee was ordered to stay. I was ordered to stay. Sergeant Frank Stiles was ordered to stay.

Q. What date is this, please?

A. On the 24th.

Q. September 24th of '86, right?

A. Yes.

Q. And you say you were ordered to stay. For what specific purpose?

[311] A. To interview all the wagon crews.

Q. Was that the same with the other officers as well, they were ordered to stay, was that your testimony?

A. Yes. Well, they were probably asked to stay but I was ordered to stay. It was my anniversary. I didn't want to stay.

Q. But you were nevertheless ordered to stay?

A. Yes, and I did.

* * * * *

Q. What occurred next in the course of your investigation?

A. Well, Chief Vetter had indicated that we were going to have to pick up Officer Nearhood and Officer O'Brien. We went out there, I guess it was probably 5:00, 5:20, went down to the desk, uniform desk, and they have a Rolodex with all the officers' addresses—I don't know where they live—got their addresses and phone numbers and went out to pick them up.

Q. Do you know whether they were on or off duty?

A. They were off duty.

Q. You had determined that, correct?

A. Yes. They were on days off. It was indicated in Chief Vetter's office that, you know, why don't we just call them up and have them come in. They said they're on days off. We've got to expedite this thing. We have to have these people interviewed [312] immediately. It's new information. We got to get it taken care of.

Q. And what was—did you undertake to do this by yourself or was there someone else with you at the time?

A. Frank Stiles was told to come with me.

Q. And what did you understand the purpose of interviewing Officers Nearhood and O'Brien to be at that point?

A. What was the purpose? To go over the information that—well, when Frank went over the dispatch tickets, there was other calls that Detective Wilbur had missed. I think it was one or two that Chuck and Dave had been to. Just to find out more information from them, maybe possibly they came across the victim or ran across Ed White during their tour of duty.

Q. So between you and Sergeant Stiles, you determined that there were some additional questions to ask Officers Nearhood and O'Brien?

A. Oh, yes.

Q. And would you state whether or not you were aware that they were the crew assigned to that district by the way?

A. How did I find that out?

Q. Were you aware of that fact?

A. Yes.

* * * * *

[336] Q. Doesn't that report of Officer Layson indicate that he was one of the individuals that found this man that reported to the scene?

A. He found him at 638 Vance in the home of Emma Jean Adams.

Q. All right. And doesn't that report also indicate that, in fact, later that day Officer Layson came upon a man who claimed to have witnessed two white male police officers?

A. Yes.

Q. And that he alleges that those two white male police officers had a wagon?

A. Yes.

Q. And that those two white male police officers from that wagon were involved in the beating of the victim?

A. Let me read this. Okay. Yes, you're right.

Q. All right. So the city police on September 3rd which was the date of this assault, 1986, had a crime, they had a victim and they had a witness?

A. Yes.

Q. All right. And the crime was against—what's the man's name, victim's name?

A. Robert White.

* * * * *

[354] Q. So if we can look at this on September 23rd, did we have any other eyewitnesses to the assault on the victim Robert Wright other than Johnny Ringo and Ed White?

A. Not that I can recall.

Q. And those two witnesses alleged—first Ed White—that there were two white police officers and a wagon and Johnny Ringo that there was a police wagon?

A. Yes.

Q. Is it safe to say then that your suspects at that time would have been two white police officers that were in the City Park vicinity on September 2, 1986 in a police wagon?

A. Well, see, when—no.

Q. No. You would not consider that to be suspects?

A. Not completely because what had happened was Johnny Ringo had tainted Ed White's statements to myself and to Doug Wilbur. I had to go over that on the 23rd. In going over it on the 23rd [355] with Ed White, he came up with a story that, "Well, yeah, I did find it out from Johnny Ringo. I didn't come on this on myself." He says, you know, "I lied."

Q. He admitted that he initially heard about the beatings from Johnny Ringo?

A. Yeah.

Q. Did he still admit though as to what he saw in City Park?

A. Yeah.

Q. He still claimed that that's what he saw, two white police officers and a wagon at City Park?

A. Yes, he did.

Q. Now, at this point, you have interviewed Eggert and Miller, Nearhood and O'Brien, and Ed White has picked out of a photo array Babcock and Luetta?

A. Luetta.

Q. Luetta. And I take it then that on September 24th is the date that you picked up Officers Nearhood and O'Brien?

A. Yes, I did.

Q. Now, did anything change between September 23rd and September 24th?

A. What do you mean by—

Q. Any witnesses, any new evidence other than what we have talked about?

A. Johnny Ringo, his information, and the statements that he had made about a wagon and the police being involved.

[356] Q. All right. Now, after you had that information, did anything new come about until you picked up Nearhood and O'Brien on the 24th?

A. I don't know specifically what you're going for. I don't believe, no.

Q. I don't show anything in my file either. I just wanted to confirm—

A. I thought maybe you had something I didn't have. I don't remember, no.

Q. All right. Now, will you tell us what the urgency was as to why Nearhood and O'Brien who had already been interviewed had to be picked up at home?

A. That was an order given to me by Deputy Chief Vetter.

Q. What was the order that was given to you?

A. The order was that I wasn't going to leave work. I said that I would rather go home, it was my anniversary and I had plans, I didn't want to be there. He said Navarro, you're going to stay, I order you to stay. I said, well, fine. You call my wife and explain it to her because she was upset.

Q. What was the order that was given to you with regard to Nearhood and O'Brien, sir?

A. Could you repeat that, please?

Q. What was the order that was given to you regarding Nearhood and O'Brien?

A. He said that we've got to pick up Nearhood and O'Brien and [357] talk to them. They were the primary district crew. We've got to get this thing over with. They are on days off. We want to clear this thing up. We've got a second witness now that says possibly the police were involved, and for the expediency in the matter, rather than, you know, waiting until they came back to work and the circumstances involved around it from the different civic groups and organizations that were on the department to solve this thing, mainly the black organizations blaming the police department for not taking quick action, they were brought in to expedite the investigation.

Q. Did anyone express any reserves about the decision to pick them up?

A. Well, Frank Stiles says why can't we call them up on the phone and Vetter says, no, you're not going to call them up on the phone, you're going to pick them up.

If you call them on the phone, they're going to have excuses that they can't come down. We've got to get this thing done with. We've got to get the interviews done today.

Q. Did you express any reservation about picking them up?

A. I didn't want to go at all. Yes.

Q. About picking them up?

A. I said I would rather have called them up and had them—I don't remember saying that but, no, I didn't want to. I wanted to go home.

Q. Did anybody else express any reserves about picking them [358] up?

A. Frank and I and Dave Roberts were there. I don't remember.

Q. Was there anyone there from Internal Affairs?

A. No, not that I remember.

Q. Sergeant McCorvey wasn't there?

A. No.

Q. Wasn't in the room?

A. No.

Q. And just so I'm clear, the urgency, as I have understood it from your testimony, was that the black community was putting pressure on the police department to do something?

A. Well, I'm just saying that. That's my personal opinion.

Q. Any other urgency that you know of?

A. Well, the new information that Johnny Ringo had brought up implicated the police more, and we had to eliminate that or just get it out of the way.

* * * * *

[359] Q. Was it your understanding that all officers were to be interviewed that night?

A. It was my understanding that they were going to get all the wagon crews in to interview them, yes.

Q. And the only ones you interviewed were Nearhood and [360] O'Brien?

A. Yes, because I had a promise that I would be able to leave.

Q. And you're the primary—I mean, the chief investigator on the case?

A. I was the primary investigator, yes.

Q. On September 24, 1986, did you suspect Nearhood and O'Brien of any wrongdoing?

A. On September what?

Q. Twenty-fourth?

A. Did I suspect them of anything? No.

Q. Of any wrongdoing?

A. No.

Q. They had already given you a statement. Did you suspect that there was something they left out of the statement?

A. They had given me a statement on the 21st. This new information with Johnny Ringo on the 23rd even implicating the wagon crew, we found him, talked to him to eliminate it. They were brought in again to go over their activities for the night. Frank Stiles had also gone through the dispatch cards and found even more information with calls that the officers had made in more detail than Doug Wilbur.

Q. Officer, isn't it true that the statements that were made by the officers in their initial interview with you on September 21st would have had to have been false for you to get any information from them at all in your interview on September 24th?

[361] A. I don't understand your question. How could it be false when it was dispatched? They had dispatch cards.

Q. They were withholding information, isn't that what you thought, withholding information?

A. No. I said that after Frank Stiles had gone over and listened to the tapes in more detail than Doug Wilbur had about the wagon crews, that that information had to be gone over. There was different—he had actually added probably a call or two in there than Doug Wilbur had. I'm not blaming Doug but he probably didn't listen as well.

Q. There was another call that they made?

A. Yes, I believe so.

Q. And that was the urgency of bringing them in?

A. The urgency was just to go over all the information again.

Q. The chief didn't know about that other call, did he—

A. I don't know.

Q. —when he ordered them to be brought in?

A. I don't know.

Q. He might have. I can't specifically answer you. I don't want to give you false information.

* * * * *

[370] Q. (By Mr. Zoll) Just one other question then.

A. Sure.

Q. Sergeant, as chief investigator, can you tell me how many other police officers were escorted from their homes?

A. There weren't any.

MR. ZOLL: Thank you. No other questions.

* * * * *

[398] [FRANK STILES TESTIMONY]

Q. By whom are you employed?

A. The City of Toledo, Toledo Police Department.

Q. How long have you been so employed?

A. Will be 23 years April 2d.

* * * * *

Q. In 1986 when this incident that we're all in court about took place, what was your assignment?

A. My assignment at that time I was the superintendent for the scientific services unit.

* * * * *

[399] Q. On the evening in question, do you recall meeting with Chief Vetter relative to the interview of police wagon crews?

A. Yes. It was actually in the afternoon, late afternoon.

Q. Would you describe to the jury what happened at that time?

A. I was advised by Lieutenant Roberts that he wanted my assistance on the City Park investigation and that Chief Vetter [400] had instructed him to tell me that and they were going to have a meeting, and I went down to Chief Vetter's office which is located on the same floor as the Investigative Services Bureau, and at that time, I went in and I believe Chief Vetter was there, Sergeant Navarro, and Lieutenant Roberts. I believe Sergeant Burpee was there at one point. People were coming in and out so—but I remember those people being there during parts or all of the conversation.

Q. Was your mission described to you at that point?

A. Yes, it was.

Q. What was that mission to be?

A. I had been involved to some extent prior to that particular day, the day before. I had actually gotten

involved through Lieutenant Roberts. He had asked me to go over to communications and listen to all the dispatcher tapes and check the daily sheet and also the cards for activities of the wagon crews in the area of the City Park between midnight on September 3, 1986, until, 03:30 hours that same date.

Q. Did that investigation correlate with your mission of September 24th?

A. Yes, it did.

Q. And how was that described to you, that is, your job on September 24th by Chief Vetter or others?

A. Chief Vetter described to us at that time that he wanted all the wagon crews interviewed, and he instructed Sergeant [401] Navarro and myself specifically to start with the wagon crew that had worked in that area that night, being Officers David O'Brien and Charles Nearhood.

Q. I'm going to show you a couple exhibits that have been shown to Mr. Zeller marked Exhibits M, N, and O, and I would like you to take an opportunity to review those and then I will ask you a question or two about them.

A. Yes, I recognize them.

Q. What is the first document described as Exhibit M?

A. The first document is a list of all the wagon crews that worked that particular evening on September 3rd.

Q. Who prepared that?

A. I prepared this to give to the other men who were going to interview these people to assist them with that interview.

Q. Was the intent of that evening to touch bases with all those police officers?

A. My understanding it was, yes.

Q. How many police officers are listed there? Count them if you care to.

A. There's eighteen; nine crews.

Q. How many individual officers were you going to have contact with that night as far as you know?

A. We were assigned, first of all, to talk to Officer O'Brien and Officer Nearhood and then we were going to talk to as many officers as we could.

* * * * *

[409] Q. Why did you go over to Nearhood's house and David O'Brien's house to pick them up when you might have used some other means to get them in the Safety Building?

A. Oh. In fact, when we were talking in Deputy Chief Vetter's office, they indicated that these gentlemen were on days, they would be back Friday, and I asked the Chief, "Why don't we just wait until Friday?" He said, "No, it's imperative we talk to him now. We want to talk to all the crews and we would like to get all nine crews in tonight and talk with them." He said, "I want you to go out and get them and bring them in." I said, "Fine." And I think somebody mentioned, "Well can we give them a call?" He said, "no, I prefer it if you go out and bring them in."

* * * * *

[442] Q. Did you recall his testimony regarding the fact of no suggestions were made that these men could be called in by phone or that they were rejected by the chief?

A. No. I understood him to say that he didn't recall that, but it did, in fact, happen because I recall it.

Q. What about the overtime, do you remember the chief stating that when somebody came in on this matter that they could clock in and they would be paid overtime?

A. He might have said that, but I don't personally really recall that.

Q. And that wasn't followed with regard to these two officers, was it, they weren't permitted to clock in when they arrived?

A. They were paid overtime—

Q. Answer my question, if you will.

A. I don't know—

Q. Were they permitted to clock in when they arrived?

A. No, they did not clock in when they were with us.

Q. In fact, you took them right up, did you not?

A. Yes, we did.

* * * * *

[450] Q. Officer, in fairness, isn't it true that these two officers were suspects?

A. They are not—they were not suspects.

Q. What's your definition of a suspect?

A. A suspect is a person you feel is guilty of a crime or is a good likelihood he's guilty of the crime.

Q. And you didn't feel that two white police officers were suspects in this crime?

A. They were suspect to some people, the community and the media and to Mr. White, and we have to keep an open mind that there is a possibility that they could turn out that policemen were involved, but my experience and my knowledge and what I knew of that incident and the background of these two officers, I did not feel that they were involved in this incident and they were not true suspects in my mind.

Q. And yet, all you had to do was pick up the telephone and call them and give them the choice or ask them to come down over the telephone?

A. The discussion with Chief Vetter about that was that—and [451] I have had a lot of experience that way myself in the past. It was immediate that we get them

and talk to them—we wanted to talk to all the wagon crews because there was a lot of pressure from the media and city fathers to get on with this investigation and try to come up with a perpetrator and get the information we needed.

Somebody mentioned phone call to them and he said, no, and he wanted us to go out and pick them up and the reason you do that, lot of times when you call people on their day off, they have their wife say, hey, I'm not home, they come up with some reason why they don't want to come down. It's their day off. Sergeant Navarro had a wedding anniversary. But if you're there, it's pretty hard to say no, I'm not going to come down, I'm not going to cooperate, Sergeant, I will see you next week or whatever. I mean, they have the freedom to do that.

But people usually won't do this when you go out to pick them up. Fine, I will come down, won't take long, come on down, so it's been my experience when it's important to go right out and pick them up.

* * * * *

[454] Q. (By Mr. Zoll) Sergeant Stiles, it's your position that two white males, Toledo police officers operating a Toledo police division patrol wagon were not suspects in this matter?

A. There were allegations to that. They were—these officers were not suspects to me. I had reservations about that based on what I knew, but if somebody looked at that situation, they probably would consider that they—you know, the police department was under suspicion, obviously, but I knew things that other people didn't as far as the media goes.

Q. All right. I'm going to hand you what I believe is commonly referred to as a supplemental crime report.

A. Yes.

Q. And who—what is the offense reported up there?

[455] A. Assault, rape, kidnapping.

Q. And who was the victim?

A. The victim was Robert Wright.

Q. And what does that report say as to who the suspects are?

A. It has listed under suspects unidentified Toledo police officers, two, described only as white male wearing Toledo police division uniforms and operating Toledo police division patrol wagon.

Q. What's the date of that report?

A. This report was dated September 3, 1986, at 13:00 hours which is 1:00 o'clock.

MR. ZOLL: I will ask that this document be marked as Plaintiff's Exhibit.

(Thereupon, Plaintiff's Exhibit 2 was marked for identification.)

MR. ZOLL: I have no other questions, Your Honor—oh, wait, one minute. One other question.

Q. (By Mr. Zoll) Was Officer O'Brien ever advised that he was not a suspect?

A. I don't know if we told him that you're not a suspect. I don't recall whether we actually told him that in words, that he was, but he was not told he was.

* * * * *

②
No. 90-346

Supreme Court, U.S.

FILED

SEP 20 1990

JOSEPH F. SPANOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

TOLEDO POLICE PATROLMAN'S ASSOC., LOCAL 10, I.U.P.A.;
CHARLES R. NEARHOOD; DAVID M. O'BRIEN,
On Behalf of Themselves and all other
persons similarly situated,
Petitioners,

vs.

CITY OF TOLEDO; DONNA OWENS, MAYOR; GENE COOK,
VICE-MAYOR; CARTY FINKBEINER; LINDA FURNEY;
PETER UJVAGI; MARK PIETRYKOWSKI; STEVE
YARBROUGH; JUDY JONES; MAX REDDISH; C.E. RISER;
PHILIP HAWKEY, CITY MANAGER; JOHN MASON, CHIEF
OF POLICE; SGT. FRANK STILES; and SGT. RONALD
NAVARRO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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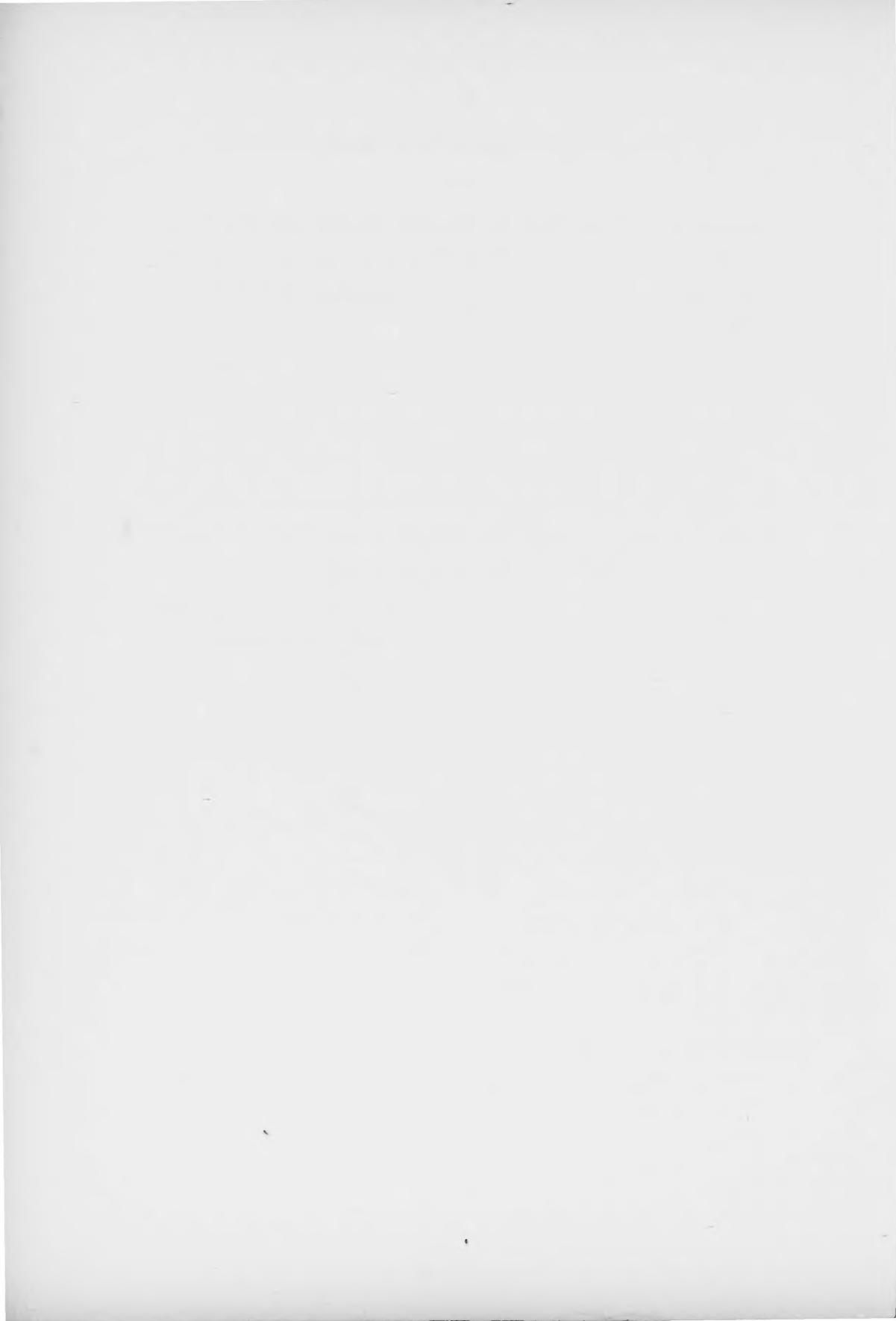
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No. 90-346

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October Term, 1990

TOLEDO POLICE PATROLMAN'S ASSOC., LOCAL
10, I.U.P.A.; CHARLES R. NEARHOOD; DAVID M.
O'BRIEN, On Behalf of Themselves and all other
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PIETRYKOWSKI; STEVE YARBROUGH; JUDY
JONES; MAX REDDISH; C.E. RISER; PHILIP
HAWKEY, CITY MANAGER; JOHN MASON,
CHIEF OF POLICE; SGT. FRANK STILES; and
SGT. RONALD NAVARRO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises in an employment context. Petitioners, Charles Nearhood and David O'Brien and Respondents, Frank Stiles and Ronald Navarro, are all police officers employed by the City of Toledo, Ohio.

Petitioners are patrol officers who, on the evening of September 3, 1986, had been assigned to patrol an area of the City of Toledo where an individual was seriously assaulted. See App. pp. A7-A8. Respondents are Police Sergeants who were assigned to investigate the assault. See App. pp. A3-A4, A7.

During the course of the investigation, on September 24, 1986, it was determined by Deputy Chief Raymond Vetter, (Chief Vetter was not made a party to this lawsuit) that it was necessary to immediately interview all police wagon crews who had been on patrol the night of the assault, including the Petitioners. See App. pp. A4-A5.

Petitioners were not scheduled for regular duty shifts for two more days, and Chief Vetter determined that questioning about the incident could not be delayed for that length of time. See App. pp. A9-A10. Respondents, Sergeants Stiles and Navarro, were ordered to remain on duty the evening of September 24, 1986, beyond their own regular duty hours, for the purpose of interviewing the wagon crews. See App. p. A8.

There is no dispute in this case that on-duty officers could have been ordered to report immediately for questioning and during the course of trial in this case, Petitioners acknowledged that, as police officers, they are subject to recall to duty twenty-four (24) hours a day. See App. pp. A12-A13, A17.

Respondents drove to Petitioners' respective homes during Petitioners' off-duty hours and relayed the order for them to come immediately to police headquarters. See App. pp. A10-A11. Once there, Petitioners were interviewed regarding any information they might have had concerning the area where the assault had occurred.

After the interview, Petitioners returned to their homes. Other officers were also questioned the same evening. See App. pp. A5-A6.

No criminal charges or administrative charges were ever brought against the Petitioners. They received overtime pay for the hours involved in the transportation to police headquarters and the subsequent interview. See App. pp. A14-A15, A18.

Petitioners subsequently filed this lawsuit against the Respondents and others, in the United States District Court for the Northern District of Ohio, Western Division. A jury trial was commenced on Petitioners' claims under 42 U.S.C., Section 1983, for alleged deprivation of liberty without due process, and under Ohio state law, for alleged false arrest.

At the conclusion of Petitioners' case, the District Court directed a verdict for all defendants except Respondents. See Pet. App. pp. A28-A34. The jury found that Petitioners had not been unlawfully or falsely arrested under state law. See Pet. App. p. A13. The District Court granted Respondents' motion for judgment NOV on the issue of qualified immunity in regard to the jury's verdict on the Section 1983 claim. See Pet. App. p. A18. The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court in all respects. See Pet. App. pp. A1-A9.

SUMMARY OF ARGUMENT

The Respondents' Petition for a Writ for Certiorari should be denied for two reasons.

The first reason is that the Sixth Circuit Court of Appeals decided no new question of federal law in this case nor did its decision raise any special or important federal issue, sufficient to warrant review by this Honorable Court.

The Sixth Circuit Court of Appeals' decision was premised squarely on the application of existing case law, principally *Monell v. Dept. of Social Services of the City of New York, et al.*, 436 U.S. 658 (1978), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987).

The second reason that Respondents' Petition should be denied is that both the District Court and the Court of Appeals correctly applied the law, as set forth in *Monell*, *Harlow* and *Anderson, supra*, to the facts in this case.

Petitioners have set forth no policy reason, pursuant to Supreme Court Rule 10, to justify review of this case on writ of certiorari and the Petition, therefore, should be denied.

ARGUMENT FOR DENYING THE WRIT

The District Court and the Court of Appeals quite properly viewed the interview of Petitioners, Nearhood and O'Brien, as a component of the employer-employee relation which police officers have with the department they serve. Petitioners claim that then-Police Chief John Mason's testimony with regard to such questioning established an illegal "policy or custom" under *Monell v. Department of Social Services of the City of New York, et al.*, 436 U.S. 658 (1978). Mason testified, in relevant part:

"I think it is inherent in the responsibility of the law enforcement organization and their rights to conduct the business of that association that they have—the administration has the authority to compel a police officer to report to the station house, answer questions, submit to an interview or interrogation with regards to his performance of duty." See App. p. A2.

In evaluating this testimony, the Sixth Circuit Court of Appeals correctly observed:

"[P]olice officers may be called to duty at any time, and, as a part of that duty, may be questioned about their activities. Such questioning, absent more, is certainly not illegal, and is consistent with the duties of a police officer. Even assuming that Mason's statement does create a city policy, any illegal action allegedly committed by Stiles or Navarro (such as a failure to give a *Miranda* warning) is not explicitly within this policy as stated by Mason. Thus, viewing the evidence in the light most favorable to the [Petitioners], and giving them the benefit of all reasonable inferences, we find that the district court did not err by directing a verdict for Mason, the City of Toledo, and the named city officials." See *Pet. App.* at p. A6.

Even apart from Mason's statement, there is simply no evidence in the record of any illegal "policy or custom" under *Monell* which could entail liability for Mason, the City of Toledo or the other City officials in whose favor the District Court directed a verdict during the course of the trial.

Petitioners further contend that the lower courts erred in concluding that the actions of Respondents, Sergeants Stiles and Navarro, were protected under the qualified immunity doctrine. See, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Poe v. Hayden*, 853 F.2d 418 (6th Cir. 1988); *Dominque v. Telb*, 831 F.2d 673 (6th Cir. 1987).

In *Poe v. Hayden*, *supra*, the Sixth Circuit Court of Appeals summarized the rules regarding the qualified immunity doctrine, which apply here:

"Government officials performing discretionary functions are afforded qualified immunity, shielding them from civil damages, as long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known' *Harlow v. Fitzgerald*, ***. Thus, whether an official 'may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken. *Anderson v. Creighton*, _____ U.S. _____, 107 S.Ct., 3034, 3038, 97 L.Ed. 2d 523 (1987). (citations omitted)." *Id.* at 423.

The evidence in the record establishes that Petitioners were not arrested, and the lower courts, reviewing this evidence, also concluded that no arrests occurred. See, Pet. App. pp. A8, A17. However, even if the Petitioners' transportation to and questioning at

police headquarters had been construed as a custodial detention, Petitioners' *Miranda* argument fails to breach the qualified immunity defense. The failure to render a *Miranda* warning is *not* an independent constitutional tort. Instead, a *Miranda* violation gives rise to the exclusionary rule and suppression of incriminating statements in a subsequent criminal prosecution. See, *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436, 1442 (8th Cir. 1989); *Miranda v. Arizona*, 384 U.S. 436 (1966). Similarly, a procedural violation of a municipal code section or a breach of a collective bargaining agreement does not equate to a violation of a constitutional right. See *Hawks v. City of Pontiac*, 874 F.2d 347 (6th Cir. 1989).

This Court's holding in *Anderson v. Creighton*, 483 U.S. 635 (1987), requires any alleged "rights" which Petitioners claim were violated to have been "clearly established" at the time the allegedly wrongful acts were committed. See, *Anderson*, 483 U.S. at 639-40; see also, *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989). Such rights must be "particularized" in a fact-specific context, not general in nature like the right to "due process of law." *Danese*, 875 F.2d at 1242. As applied to Respondents Stiles and Navarro, the test is:

"[W]hether a reasonable officer could have believed [his conduct] to be lawful, in light of clearly established law and the information [he] possessed." *Id.* at 641.

This *objective* test is not retrospective; rather, it requires an analysis of the facts as faced by Respondents and a consideration of the pertinent law as it then existed. *Anderson*, 483 U.S. at 641. The District Court evaluated all the circumstances surrounding the questioning of Petitioners and found that Respondents

did not violate "clearly established" rights. See, Pet. App. p. A17. In fact, as to the clarity of the rights allegedly violated, the trial court ruled:

"[T]he issue of when and how police officers can be compelled to participate in a criminal investigation in the employment context, as distinguished from their constitutional rights, is anything but clear. *** The contours of the rights allegedly violated are not sufficiently clear that [Respondents] would understand objectively [their] conduct in this case to have violated [Petitioners'] rights." See Pet. App. p. A18.

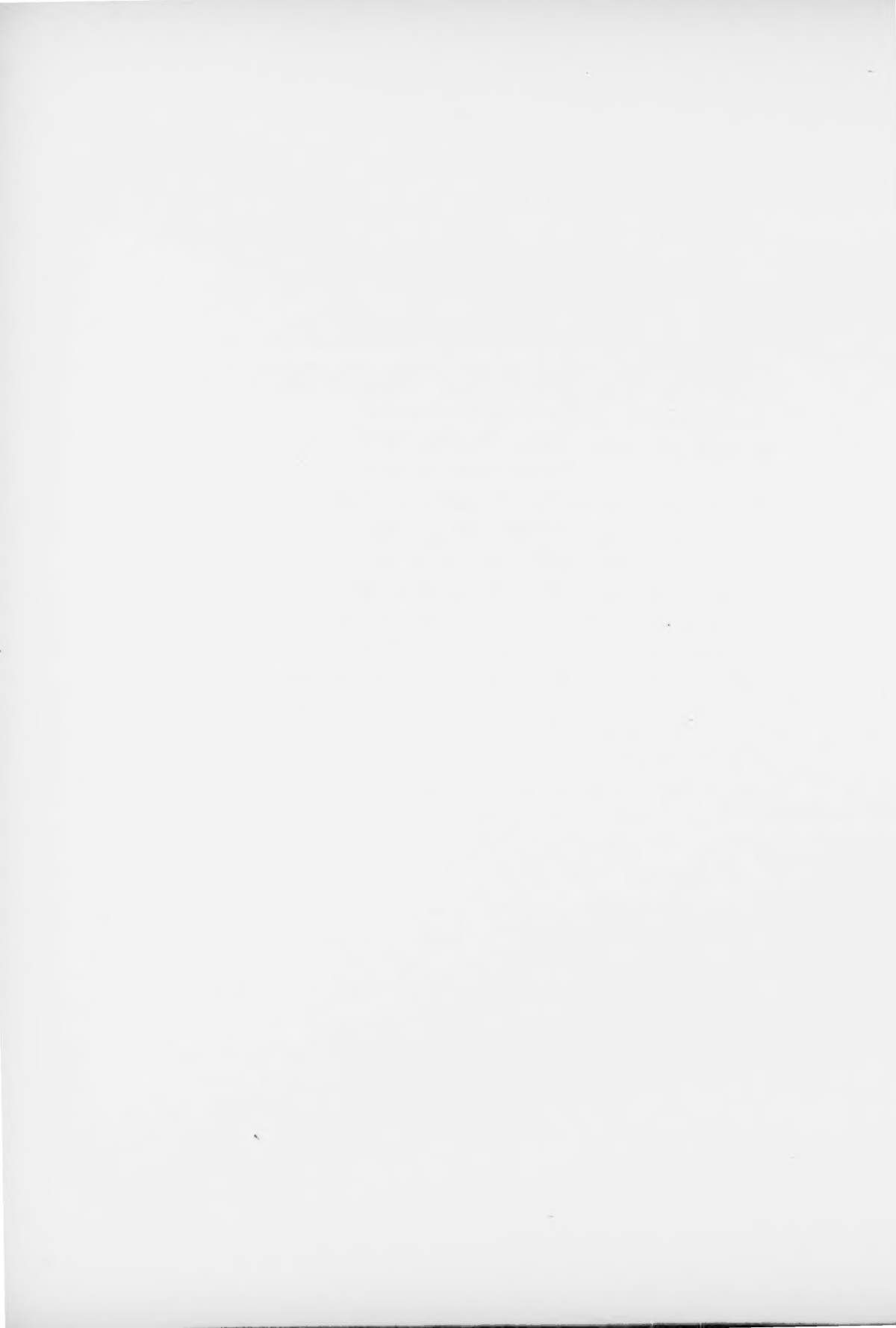
The trial court also found that at the time of the incident a "reasonable police officer" in Respondents' position could have believed his conduct was lawful. For all of the foregoing reasons, the defense of qualified immunity protected the Respondents from liability in this case and the District Court correctly entered a judgment NOV on Petitioners' claims under Section 1983. *Anderson, supra*.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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A1

APPENDIX

EXCERPTS OF TRIAL TRANSCRIPT

[TESTIMONY OF JOHN MASON BY WAY
OF DEPOSITION]

* * *

[257] Q. Would the command officers have the authority to require an officer to come downtown in a police vehicle instead of their own vehicle?

A. If they felt that was appropriate, yes.

Q. Without placing them in custody?

A. Correct.

Q. So they could require them to come downtown in a police vehicle without placing them in custody?

A. Correct; yes.

Q. And they would also have the authority to refuse to let them come down in their own transportation vehicle?

A. If they felt that was appropriate, yes.

Q. And then you started to talk about reading them their rights. Are you telling me at some later time they would be?

A. If there were found—

Q. If they?

A. Yes, It's a typo.

Q. Yeah.

A. Shall I read it as they?

Q. They, yes.

A. If they were found to be a suspect or if they were focused upon as a suspect as a result of that interview or interrogation, then they should properly be read their constitutional rights against self-incrimination.

Q. What is the source of that authority, that authority to require [258] an off-duty police officer to come downtown for questioning against his will?

A. What is the source of it?

Q. Yes, sir.

A. I'm not sure that I can point to a direct section of the division manual. I think it is inherent in the responsibility of the law enforcement organization and their rights to conduct the business of that association that they have—the administration has the authority to compel a police officer to report to the station house, answer questions, submit to an interview or interrogation with regards to his performance of duty.

MR. ZOLL: Thank you.

THE COURT: Is that all?

MR. ZOLL: That's all Your Honor.

THE COURT: Thank you.

[399] [TESTIMONY OF FRANK STILES]

* * *

Q. Were you called on from time to time to remove yourself from that department or unit and perform other functions?

A. Yes.

Q. And is that what happened in this case?

A. Yes.

Q. Where you born and raised?

A. Toledo, Ohio.

Q. Did you attend school here in Toledo, Ohio?

A. Yes, I did.

Q. Where did you go to school?

A. I went to Waite High School on the east side.

Q. Graduate from Waite High School?

A. Yes.

Q. What year did you graduate?

A. I believe 1957 or '58. Fifty-eight I think.

Q. How soon thereafter did you join the Toledo police division?

A. Went to the Army for two years and—well, '58, then I joined the police department in 1965, April the 6th.

Q. On the evening in question, do you recall meeting with Chief Vetter relative to the interview of police wagon crews?

A. Yes. It was actually in the afternoon, late afternoon.

Q. Would you describe to the jury what happened at that time?

A. I was advised by Lieutenant Roberts that he wanted my assistance on the City Park investigation and that Chief Vetter [400] had instructed him to tell me that and they were going to have a meeting, and I went down to Chief Vetter's office which is located on the same floor

as the Investigative Services Bureau, and at that time, I went in and I believe Chief Vetter was there, Sergeant Navarro, and Lieutenant Roberts. I believe Sergeant Burpee was there at one point. People were coming in and out so—but I remember those people being there during parts or all of the conversation.

Q. Was your mission described to you at that point?

A. Yes, it was.

Q. What was that mission to be?

A. I had been involved to some extent prior to that particular day, the day before. I had actually gotten involved through Lieutenant Roberts. He had asked me to go over to communications and listen to all the dispatcher tapes and check the daily sheet and also the cards for activities of the wagon crews in the area of the City Park between midnight on September 3, 1986, until, 03:30 hours that same date.

Q. Did that investigation correlate with your mission of September 24th?

A. Yes, it did.

Q. And how was that described to you, that is, your job on September 24th by Chief Vetter or others?

A. Chief Vetter described to us at that time that he wanted all the wagon crews interviewed, and he instructed Sergeant [401] Navarro and myself specifically to start with the wagon crew that had worked in that area that night, being Officers David O'Brien and Charles Nearhood.

Q. I'm going to show you a couple exhibits that have been shown to Mr. Zeller marked Exhibits M, N, and O, and I would like you to take an opportunity to review those and then I will ask you a question or two about them.

A. Yes, I recognize them.

Q. What is the first document described as Exhibit M?

A. The first document is a list of all the wagon crews that worked that particular evening on September 3rd.

Q. Who prepared that?

A. I prepared this to give to the other men who were going to interview these people to assist them with that interview.

Q. Was the intent of that evening to touch bases with all those police officers?

A. My understanding it was, yes.

Q. How many police officers are listed there? Count them if you care to.

A. There's eighteen; nine crews.

Q. How many individual officers were you going to have contact with that night as far as you know?

A. We were assigned, first of all, to talk to Officer O'Brien and Officer Nearhood and then we were going to talk to as many officers as we could. We were going to split that up as the time [402] progressed, so there wasn't any specific number we were assigned to the other ones except those two we start out with. We were also going to talk to other people during that night as time permitted.

Q. Did you, in fact, talk to other police officers?

A. I did.

Q. By name do you recall them?

A. Yes. Wayne Onstwedder.

Q. Any others?

A. That's only three that I talked to that night.

Q. Would you look at Exhibit N and describe that in general to the jury?

A. Yes. This is a copy of what we call dispatcher cards. There's four of them exhibited on this exhibit.

A6

Q. And what are those relative to?

A. These are relative to the wagon crews that were working that particular area and events that occurred with those wagon crews on September 3rd during that period of time, midnight and 03:30 hours.

Q. Any particular wagon crews that those dispatch cards refer to?

A. There's more than one. The Officer O'Brien and Nearhoods' wagon crew, 7 Nor 57, there's also 2 Charlie on this particular one.

*** * ***

[296] [TESTIMONY OF RONALD NAVARRO]

* * *

Q. Sergeant, state your full name for the record, please?

A. I'm Sergeant Ronald Navarro.

Q. And your address?

A. 4204 Hurley, Toledo, Ohio.

Q. And your place of employment, please, sir?

A. City of Toledo, Division of Police.

Q. How long have you been employed with the Police Department?

A. Fifteen years today.

Q. Now, Officer, did there come a time when you became aware of an incident which had occurred in the area of a park in the City of Toledo known as City Park; did there come a time when you became aware of an incident that occurred in September of 1986?

A. Yes, sir. On September 15th, I believe it was, Chief Vetter came to the homicide office and assigned the felonious assault investigation to me.

* * *

[310] Q. Did you have any suspects at this particular time, Sergeant?

A. No, I didn't—well, in the original crime report, Mr. Wright indicated to Emma Jean Adams in her home when she—she's the original person that found him. He told her that four kids had taken his clothes and beat him up. His reply to him was, "You're lying. You're lying. What really happened to you?" He said, "I'm telling you four kids beat me up." And she called the police. They took him to the hospital.

Q. So as you're undertaking to interview all of the wagon crews or at least those that were assigned to you, you had this information at hand at the time, didn't you?

A. Yes.

Q. And how was the matter of interviewing all of the wagon crews divided up; were others besides you involved in this endeavor, Sergeant?

A. Sergeant Burpee was ordered to stay. I was ordered to stay. Sergeant Frank Stiles was ordered to stay.

Q. What date is this, please?

A. On the 24th.

Q. September 24th of '86, right?

A. Yes.

Q. And you say you were ordered to stay. For what specific purpose?

[311] A. To interview all the wagon crews.

Q. Was that the same with the other officers as well, they were ordered to stay, was that your testimony?

A. Yes. Well, they were probably asked to stay but I was ordered to stay. It was my anniversary. I didn't want to stay.

Q. But you were nevertheless ordered to stay?

A. Yes, and I did.

Q. Did you have plans that evening?

A. Oh, yes, big plans.

Q. You were going to dinner, were you?

A. Yes.

Q. What occurred next in the course of your investigation?

A. Well, Chief Vetter had indicated that we were going to have to pick up Officer Nearhood and Officer O'Brien. We went out there, I guess it was probably 5:00, 5:20, went down to the desk, uniform desk, and they have a Rolodex with all the officers' addresses—I don't know where they live—got their addresses and phone numbers and went out to pick them up.

Q. Do you know whether they were on or off duty?

A. They were off duty.

Q. You had determined that, correct?

A. Yes. They were on days off. It was indicated in Chief Vetter's office that, you know, why don't we just call them up and have them come in. They said they're on days off. We've got to expedite this thing. We have to have these people interviewed [312] immediately. It's new information. We got to get it taken care of.

Q. And what was—did you undertake to do this by yourself or was there someone else with you at the time?

A. Frank Stiles was told to come with me.

Q. And what did you understand the purpose of interviewing Officers Nearhood and O'Brien to be at that point?

A. What was the purpose? To go over the information that—well, when Frank went over the dispatch tickets, there was other calls that Detective Wilbur had missed. I think it was one or two that Chuck and Dave had been to. Just to find out more information from them, maybe possibly they came across the victim or ran across Ed White during their tour of duty.

Q. So between you and Sergeant Stiles, you determined that there were some additional questions to ask Officers Nearhood and O'Brien?

A. Oh, yes.

Q. And would you state whether or not you were aware that they were the crew assigned to that district by the way?

A. How did I find that out?

Q. Were you aware of that fact?

A. Yes.

Q. Do you know when they had—or when they were expected back to work Sergeant?

A. I believe in the office, Chief Vetter found out that they [313] were due back in two days. He said that was too long to wait. We've got to talk to the officers

tonight. In fact, I guess the majority of the wagon crews were off. Probable three-quarters of them were off the next couple days. It was too long. We couldn't wait two more days. We had to get all the interviewing done.

Q. And what occurred next then on the 24th?

A. Well, we went out to, I believe, an apartment on South Airport Highway near Byrne. I don't remember what it was, whether Officer O'Brien had listed in the Rolodex where he lived. I know he testified earlier that he indicated in the academy that he had given—

MR. ZOLL: Objection, Your Honor.

THE COURT: Sustained.

A. Well, anyway, I went over there, found out that he didn't live at that address. We left and we proceeded to Chuck Nearhood's house in Maumee, Ohio.

Q. Now, how were you dressed at the time, Sergeant?

A. In sport coat and trousers.

Q. All right.

A. Tie.

Q. Do you recall how about Sergeant Stiles?

A. Same attire.

Q. What sort of a car did you go in?

A. I was assigned a Volare. It was a black Volare.

* * *

[315] A. Okay. Well, whatever. Sergeant Stiles and I then walked to our car and waited for Officer Nearhood.

Q. Did you go back to the house at all?

A. No.

Q. So how long were you at the front door?

A. Not very long, couple minutes, two or three, I don't know. It wasn't very long.

A11

Q. Did you indicate to Officer Nearhood that he was being placed under arrest?

A. Oh, no; no.

Q. Why not?

A. Because he wasn't a suspect and I didn't have a warrant.

Q. Was it your intention—what was your intention when you went out there?

A. My intention was to follow what Chief Vetter had said, to go pick him up, to bring him in, to go interview him.

Q. Interview him for what purpose?

A. Interview him in regard to his activities that night from the dispatch cards that Sergeant Stiles had obtained on the 23rd.

[140] [TESTIMONY OF CHARLES NEARHOOD]

* * *

Q. (By Mr. Davis) All right. Says: "Compliance with lawful orders. The division is an organization with a clearly defined chain of command. This is necessary because obedience of a supreme lawful command is necessary for the safe and prompt performance of law enforcement operations. The most desirable means of obtaining compliance are recognition and of reward of proper performance and the positive encouragement of a willingness to serve, however, discipline may be necessary where there is a willful disregard of lawful orders, commands or directives." You are familiar with that?

A. Yes.

Q. And so you went with Sergeant Stiles and Sergeant Navarro when they ordered you back to work, didn't you?

A. Yes, I did.

[141] Q. Now, you also understand—incidentally, you worked for the Maumee police department prior to Toledo, too, didn't you?

A. Yes, I did.

Q. How long was that?

A. About two-and-a-half years.

Q. When this unfortunate incident in City Park had occurred, you had been a police officer with the City of Toledo little less than a year, am I correct?

A. Well--

Q. With the City of Toledo, I mean?

A. It would have been—well, when the incident itself occurred on the 3rd of September?

Q. Um-hum.

A. It would have been less than a year, yes.

Q. And in fact, I guess you said that this was your first night in that territory?

A. In that beat, sector.

Q. District, yes. Now, Officer, with your police background with the Maumee police department and with the Toledo police department, you understand that as a police officer, you have a duty to uphold the law 24 hours a day?

A. Yes, I do.

Q. You don't contend, do you, Officer, that the City of Toledo has no right whatsoever to call you back to duty, do you?

A. No, I don't contend that at all.

[142] Q. In fact, they have that right, don't they?

A. According to that, yes.

Q. And you would agree with me, would you not, Officer, that this incident which occurred in City Park was a matter of great import to the community of the City of Toledo?

MR. ZOLL: Your Honor, I'm going to object. I think it calls for some kind of conclusion. I'm not sure it's proper.

THE COURT: Overruled. Go ahead.

A. Would you state the question again?

Q. Wasn't this incident which occurred in City Park on September the 3rd, the morning of September 3rd of 1986, wasn't that a matter of greate concern or import to the community, to the people of this City of Toledo?

MR. ZOLL: Again, object.

THE COURT: All right. Overruled.

A. I would say to the news media that was covering it and the people that covered it, yes, it was.

Q. You don't think that it was important to the citizens of the City of Toledo?

A. I cannot speak for the citizens. I can only speak for what I saw in the news media. I would say that the citizens were interested in it, yes.

[169]

* * *

Q. Well, who was arguing then on your behalf?

A. Mike Collins was.

Q. Who was he arguing it with, do you recall?

A. He went into the room with Lieutenant Roberts and Sergeant Stiles, and I don't know the conversation that went through on that one.

Q. All right. And in fact, was it the vice-president of your union who came out with the overtime report and asked you to sign it then or was it Lieutenant Roberts?

A. It was Mike Collins.

Q. And at this point, you had officially requested overtime from the City of Toledo, correct?

A. Through Mike Collins, yes, sir.

Q. All right. Overtime for police officers—how many hours of overtime did you claim when you submitted your report requesting overtime from the City of Toledo?

A. I would have to look at the slip, but I believe it said—it was written on there 17:45 to 20:45.

Q. That's three hours, am I correct?

A. Yes, sir.

Q. So I take it that part of that three hours was the forty-five minutes or an hour you spent looking for Officer O'Brien then, am I correct in that also?

A. Yes, sir.

[170] Q. Part of that overtime was the half an hour you were sitting in the hall talking to your union steward, am I correct in that also, Officer?

A. Yes, sir.

Q. And what is overtime, time-and-a-half?

A. Yes, sir.

Q. And isn't it a fact that by virtue of your collective bargaining agreement, Officer, that the minimum that you can be compensated for is actually four hours?

A. I don't understand what you're saying.

Q. Doesn't your contract call for you to be compensated a minimum of four hours?

A. I would have—I don't know the differentiation between the two-hour court call. I would have to look at that, sir.

Q. Now, while you were in the hallway talking to Ann Smith, did anyone tell you not to talk to her?

A. No, sir.

Q. You had absolutely free access to her, is that correct?

A. Yes, sir.

Q. You have been a police officer with the City of Maumee how long, sir?

A. City of Maumee, approximately two-and-a-half years.

Q. And at the time you had been a City of Toledo police officer approximately one year, am I correct?

A. Yes, sir.

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[276] [TESTIMONY OF DAVID M. O'BRIEN]

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Q. During the course of the evening, were there other things that you might have been concerned with in terms of your probationary status as things you might have done wrong in the way of ordinary police routine?

A. No, I don't believe so.

Q. But you do agree, don't you, that as a police officer, you are required to follow the orders of a superior officer?

A. Yes.

Q. And clearly, Sergeant Stiles and Navarro were superior in rank to you, were they not?

A. Yes, sir. Yes. They outranked me.

Q. And Officer, you don't disagree with the concept, do you, that your employer, the police department, has the right to call you back to duty to elicit certain information, do you agree with that?

A. If done properly, yes, they have—they may do that.

Q. What about if they come and say we need more information from you, we would like you to come downtown with us?

A. Well, I prefer call first which there was a possibility except that I was not given that right. It was not a "will you please come with us."

Q. You're saying you have the right to be called first?

A. No. They could have done that first.

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[284] Q. Members of the Toledo Police Patrolmen's Association?

A. Yes.

Q. And, Officer, isn't it true that you claim that some of these comments occurred after that piece of newsprint that came out?

A. They occurred before that and continued on through that, yes.

Q. For how long?

A. They still go on today.

Q. Have you ever sought any sort of medical attention for—

A. No, I haven't sought any medical attention.

Q. Any sort of psychological attention?

A. No, I didn't.

Q. Have you lost any money as a result of this?

A. No, I don't believe I have.

Q. Did you in fact receive overtime?

A. Yes, they did give me overtime.

Q. Well, you mentioned that you would ask for it going down in the car, and didn't you ask for it at the end of your interview when Officer Collins was around also?

A. I didn't ask for it. I was just—after they took me out of the personal assault unit, someone handed me one in the hallway and said to sign it.

Q. And didn't you inquire of anyone as to whether you were going to get overtime at that point?

[107] A. At that time, they had the card in my hand, so I just signed it.

Q. You made made no remark about it at all?

A. Not really, no.

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